No. 06-7949
Title: Brian Michael Gall, Petitioner
v.
United States
Docketed: November 27, 2006
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (05-3001)
Decision Date: May 12, 2006
Rehearing Denied: July 7, 2006
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Sep 15 2006	Application (06A304) to extend the time to file a petition for a writ of certiorari from October 5, 2006 to November 4, 2006, submitted to Justice Alito.
Sep 19 2006	Application (06A304) granted by Justice Alito extending the time to file until November 4, 2006.
Oct 31 2006	Application (06A304) to extend further the time from November 4, 2006 to November 22, 2006, submitted to Justice Alito.
Nov 1 2006	Application (06A304) granted by Justice Alito extending the time to file until November 22, 2006.
Nov 22 2006	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due December 27, 2006)
Dec 4 2006	Memorandum of respondent United States filed.
Dec 14 2006	DISTRIBUTED for Conference of January 5, 2007.
Jun 4 2007	DISTRIBUTED for Conference of June 7, 2007.
Jun 11 2007	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jun 29 2007	Motion to appoint counsel filed by petitioner Brian Michael Gall.
Jul 9 2007	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the petitioner.
Jul 11 2007	Motion DISTRIBUTED for Conference of September 24, 2007.
Jul 18 2007	Joint appendix filed. Volume 1.
Jul 18 2007	Brief of petitioner Brian Michael Gall filed.
Jul 18 2007	Motion to file Volume II of the joint appendix under seal filed by petitioner Brian Michael Gall. (Distributed)
Jul 26 2007	Brief amicus curiae of New York Council of Defense Lawyers filed.
Jul 26 2007	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. VIDED.
Jul 26 2007	Brief amici curiae of Federal Public and Community Defenders, et al. filed.
Jul 26 2007	Brief amicus curiae of Families Against Mandatory Minimums filed.
Jul 26 2007	Brief amici curiae of Washington Legal Foundation, et al. filed.
Aug 8 2007	CIRCULATED.
Aug 8 2007	Record received from U.S.C.A. for Eighth Circuit. (1 envelope) The U.S.D.C. for the Southern District of Iowa record is electronically filed. (There are sealed documents in the U.S.D.C. record).
Aug 14 2007	SET FOR ARGUMENT Tuesday, October 2, 2007.
Aug 20 2007	Motion to file Volume II of the joint appendix under seal GRANTED.

Aug 22 2007	Brief of respondent United States filed. (Distributed)
Sep 25 2007	Motion to appoint counsel filed by petitioner GRANTED. Jeffrey T. Green, Esquire, of Washington, D. C. is appointed to serve as counsel for the petitioner in this case.
Sep 25 2007	Reply brief on the merits of petitioner Brian Michael Gall filed.

Supreme Court, U.S.
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06-7949

No. 06-

IN THE

Supreme Court of the United States

BRIAN MICHAEL GALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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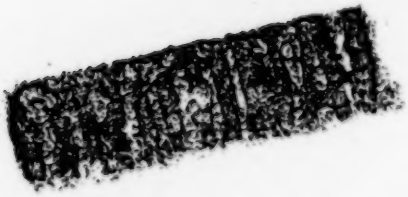

(C)

QUESTION PRESENTED

Whether, when determining the "reasonableness" of a district court sentence under *United States* v. *Booker*, 543 U.S. 200 (2005), it is appropriate to require district courts to justify a deviation from the United States Sentencing Guidelines with a finding of extraordinary circumstances.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding are listed in the caption of the case.

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IN THE

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06-

BRIAN MICHAEL GALL,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Brian Michael Gall respectfully requests that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals in this case.

OPINION BELOW

The opinion of the court of appeals is reported at 446 F.3d 884 and is reproduced in Appendix A to this Petition. The order of the district court is reported at 374 F. Supp. 2d 758 and is reproduced at Appendix B.

STATEMENT OF JURISDICTION

The Eighth Circuit denied Mr. Gall's timely petition for rehearing *en banc* on July 7, 2006. App. C. Pursuant to orders issued by the Court on September 19 and November 1, the time for filing this petition has been extended to November 22, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(a), (c): Imposition of a Sentence

(a) *Factors to be considered in imposing a sentence.*—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress

(regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * * *

(c) *Statement of reasons for imposing a sentence.*— The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,, [FN3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

* * * *

18 U.S.C. § 3742(e): Review of a Sentence

* * * *

(e) *Consideration.*—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that--

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection

(3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

* * * *

21 U.S.C. § 841(b): Prohibited Acts A

* * * *

(b) *Penalties*

* * * *

(1)(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the

provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

* * * *

21 U.S.C. § 846: Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Petitioner pleaded guilty to participation in a conspiracy to distribute ecstasy in the state of Iowa between February and September of 2000. *United States v. Gall*, 446 F.3d 884, 885-86 (8th Cir. 2006). After participating in the distribution ring for eight months, he voluntarily chose to cease all involvement in order to focus on his studies at the University of Iowa. *Id.* at 886. Over the course of the next two years, Petitioner graduated from college and started his own

business, during which time he was not involved with drugs and had no criminal record whatsoever. *Id.* In 2002, after Petitioner had moved to Arizona, federal agents approached him about his prior involvement in the ecstasy distribution ring. *Id.* Petitioner readily admitted his involvement and voluntarily made arrangements to return to Iowa in order to face charges. *Id.*

Based on the federal Sentencing Guidelines that were in effect when Petitioner's participation in the distribution ring ended in September 2000; the quantity of ecstasy for which Petitioner would be held accountable (stipulated as 2,500 grams); the Petitioner's minimal criminal history; the safety valve provision of U.S.S.G. § 5C1.2; and Petitioner's acceptance of responsibility, the trial court calculated a guideline range of 30 to 37 months' imprisonment. *Id.*

In addition to the factors weighing on the calculated guideline range, the court heard significant testimony from Petitioner's friends and family that he had matured significantly and learned from his mistakes in the two years since his temporary involvement in the ecstasy distribution ring. There was also evidence that employees of Petitioner's business depended on him for their livelihood. *Id.* at 887.

Petitioner was sentenced to three years probation. *Id.* The trial court concluded that Petitioner's "post-offense conduct [indicates] that he has, in fact, learned from his experience with the United States criminal justice system and admirably moved to secure a better future for himself." *United States v. Gall*, 374 F. Supp. 2d 758, 763 (S.D. Iowa 2005). The district court decided to impose a sentence below the recommended guideline range because "the offense level based solely upon drug quantity does not adequately reflect the offense conduct." *Id.* at 764 n.5. The court stated that Petitioner's voluntary cessation and exemplary lifestyle since his participation in the distribution ring were mitigating factors that justified downward departure under § 3553(a)(2)(A). *Id.*

On appeal, the Eighth Circuit reversed and remanded for resentencing, on grounds that the downward departure was not sufficiently supported by "extraordinary justifications." 446 F.3d at 889-90.

REASONS FOR GRANTING THE PETITION

In the opinion below, the Eighth Circuit found the district court's sentence to be unreasonable because the district court did not justify its downward departure from the Sentencing Guidelines with a finding of "extraordinary circumstances." *Id.* at 889. The Eighth Circuit Court of Appeals in *United States* v. *Claiborne* similarly held that the downward departure from the Guidelines' recommendation was not supported by "extraordinary circumstances" and vacated the district court sentence as a result. 439 F.3d 479, 481 (8th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3243 (U.S. Nov. 3, 2006) (No. 06-5618). By granting certiorari in *Claiborne* and *United States* v. *Rita*, 177 Fed. App'x 357 (4th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3246 (U.S. Nov. 3, 2006) (No. 06-5754), this Court has acknowledged that the appropriate level of scrutiny that courts of appeal should apply when determining the "reasonableness" of sentences imposed by district courts requires review and clarification. By granting certiorari in *Claiborne* specifically, this Court has recognized the importance of clarifying whether it is appropriate after *United States* v. *Booker*, 543 U.S. 200 (2005), for district courts to be required to make extraordinary justifications when they elect to depart downward from the Guidelines.

Claiborne is a suitable vehicle for this Court to resolve the question of whether it is appropriate, in the wake of *Booker*, to require that sentences which deviate substantially from the Guidelines be justified by extraordinary circumstances. As such, the petition for a writ of certiorari in this case should be held pending the Court's decision in *Claiborne* and then disposed of in light of that decision. However, should the Court determine that plenary review is appropriate in this case

as well as *Claiborne*, the matters should be consolidated for oral argument.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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November 22, 2006

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CERTIFICATE OF SERVICE

No. 06-

Brian Michael Gall,

Petitioner,

v.

United States of America,

Respondent.

I, Jeffrey T. Green, do hereby certify that, on this twenty-second day of November, 2006, I caused one copy of the Petition For A Writ Of Certiorari and In Forma Pauperis application in the foregoing case to be served by first class mail, postage prepaid, on the following party:

PAUL D. CLEMENT
SOLICITOR GENERAL
UNITED STATES DEPARTMENT OF JUSTICE
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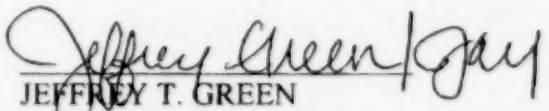
Room 5614
Washington, DC 20530-0001



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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-3001

United States of America,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Southern District of Iowa.
Brian Michael Gall,	*	
	*	
Appellee.	*	

Submitted: February 14, 2006
Filed: May 12, 2006

Before LOKEN, Chief Judge, BOWMAN and SMITH, Circuit Judges.

SMITH, Circuit Judge.

Brian Michael Gall pleaded guilty to conspiracy to distribute a mixture and substance containing methylenedioxymethamphetamine ("MDMA"), a Schedule I controlled substance, in violation of 21 U.S.C. §§ 841(b)(1)(C) and 846. The district court imposed a sentence of 36 months' probation and a $100 special assessment. The government appeals the sentence, arguing that it is unreasonable. We conclude that Gall's sentence is unreasonable. Accordingly, we remand the case for resentencing.

I. *Background*

In February or March 2000, Gall entered into an agreement with Luke Rinderknect and others to distribute MDMA, also known as ecstacy. Initially, Gall

purchased 100 ecstasy tablets from Rinderknect on six occasions between February and May 2000. During this period, Gall traveled from Iowa City, Iowa, to Pell, Iowa, to purchase ecstasy from Rinderknect.

In May 2000, Rinderknect decided to move to Burbank, California. Before leaving Iowa, he arranged a meeting with Gall and Theodore Sauerberg to facilitate the ongoing distribution of ecstasy in his absence. During the meeting, the parties agreed that Sauerberg would accept delivery of ecstasy from Rinderknect and transfer the drugs to Gall. When Gall received the drugs from Sauerberg, he distributed them to other individuals, including Ross Harbison, Jason Story, Brooks Robinson, Mark Goodding, and Corey Coleman. After receiving payment from his customers, Gall delivered the drug proceeds to Sauerberg. Sauerberg then delivered the cash to Rinderknect.

One month after the initial meeting in Iowa City, Rinderknect mailed a package containing 5,000 tablets of ecstasy to Sauerberg in Iowa City. Sauerberg then distributed the ecstasy to Gall in 1,000 tablet increments. Pursuant to the agreement, Gall distributed the ecstasy to other individuals, including Coleman who purchased a total of 1,500 to 2,000 tablets. Gall knew his customers were redistributing the drugs within the community. As the drugs were distributed, Gall paid Sauerberg for the ecstasy. After Sauerberg collected the $85,000 purchase price from Gall, he contacted Rinderknect who flew to Iowa and obtained the cash.

Approximately one to two months later, Rinderknect mailed a second package containing 5,000 tablets of ecstasy to Sauerberg in Iowa City. Again, Sauerberg distributed the ecstasy to Gall in 1,000 tablet increments. After distributing the ecstasy, Gall remitted $85,000 to Sauerberg, who delivered the money to Rinderknect.

In September 2000, Gall decided to leave the drug conspiracy. Rinderknect traveled to Iowa City and met with Gall. Gall told Rinderknect that he was getting out

of the drug business over concerns that Sauerberg was telling too many people about their ecstasy distribution business. Rinderknect sold no more ecstasy to Gall as he requested. According to Gall, he stopped selling ecstasy in August 2000 when he moved in with a new roommate and started studying for his major at the University of Iowa. Goodding testified that Gall stopped selling ecstasy in August 2000 because he did not like the trouble of having to deal with people. Gall estimated that he made $30,000 while a member of the ecstasy conspiracy.

After college graduation in 2002, Gall moved to Mesa, Arizona. Federal agents approached Gall in Arizona, requesting to speak with him about his involvement with ecstasy sales while living in Iowa. Unknown to Gall, law enforcement had already arrested Rinderknect and Sauerberg, who had implicated Gall. Gall admitted to the agents his involvement in the conspiracy. In 2004, Gall was charged in an indictment with conspiracy to distribute MDMA. Gall made arrangements to return to Iowa from his home in Winter Park, Colorado, when he learned there was a federal arrest warrant issued for him. Upon his return to Iowa, he turned himself in to federal authorities.

Because Gall withdrew from the conspiracy in September 2000, the parties stipulated that the November 1, 1999 edition of the United States Sentencing Guidelines applied to Gall's offense conduct. The presentence report ("PSR") assigned Gall responsibility for 10,000 tablets of ecstasy. The parties stipulated that for the purpose of calculating a Guidelines sentence, Gall would be held accountable for 2,500 grams of ecstasy, or 10,000 tablets, which under the 1999 Guidelines equals 87.5 kilograms of marijuana. Pursuant to U.S.S.G. § 2D1.1, 87.5 kilograms of marijuana placed Gall at a base offense level of 24. Because he qualified for the safety valve pursuant to U.S.S.G. § 5C1.2, Gall's offense level was reduced by two levels to 22. An additional three-level reduction for acceptance of responsibility resulted in a total offense level of 19.

Gall's criminal history included a conviction for failure to maintain control of his vehicle and underage alcohol possession in March 1997. As part of his sentence, Gall was ordered to pay a fine and undergo treatment for alcohol abuse. No criminal history points were assessed for this conviction pursuant to U.S.S.G. § 4A1.2(c). Gall was also convicted in December 1997 of improper storage of a firearm on a public highway. This conviction added one criminal history point pursuant to U.S.S.G. § 4A1.1(c). Finally, in March 2000, Gall was convicted of possession of marijuana for which he received a deferred judgment; no criminal history points were assigned to this conviction. With a Category I criminal history, Gall's advisory Guidelines range was 30 to 37 months' imprisonment.

At Gall's sentencing hearing, his father, Tom Gall, testified that he had observed a change in his son's life and that his son had started his own business and was doing well. He added that contractors rely on his son for expertise in installing windows. Finally, he commented that his family would be devastated if his son went to jail.

Gall's mother, Vicki Gall, testified that she believed her son realizes that he made a "stupid mistake" and that he has really learned from it. She added that during the last year, her son has become more mature. She concluded by questioning the value of incarcerating someone who had already made positive changes in his life.

Gall's counsel requested a sentence of probation, asserting that Gall was not in need of rehabilitation because he had already done an admirable job of rehabilitating himself. His counsel noted letters of support sent to the district court sent by Gall's friends and family. In addition, his counsel argued that a felony conviction is a severe consequence that would follow Gall throughout his life. Gall's counsel distinguished Gall from the codefendants who received prison sentences by noting Gall's withdrawal from the conspiracy and his assumption of a crime-free lifestyle. Counsel concluded his remarks by reminding the court that Gall's family, along with two

contract employees, "work pretty much exclusively for Mr. Gall" and were depending on Gall.

The government requested a sentence of 30 months' imprisonment, a sentence at the low end of the advisory Guidelines range. The government argued this sentence was appropriate, considering Gall already received a significant benefit by being sentenced under the 1999 Guidelines. In 1999, the Guidelines stated that 1 gram of ecstasy equated to 35 grams of marijuana. The current Guidelines equate 1 gram of ecstasy to 500 grams of marijuana, which is 14 times the conversion quantity that Gall faced. In addition, Gall's recommended sentence only included drug quantities for the period of his participation in the conspiracy not foreseeable drug quantities during the entire conspiracy. Also, Gall benefitted from a two-level safety-valve reduction. Finally, the government argued that a 30-month sentence was appropriate because the other coconspirators also received prison sentences.

Before announcing its sentence, the district court denied a defense request to depart from the advisory Guidelines range based upon aberrant behavior and extraordinary acceptance of responsibility. The court concluded that departure requests for remorse, post-offense rehabilitation, and voluntary cessation of criminal activity were best considered within the confines of 18 U.S.C. § 3553(a).

After considering the Guidelines, the district court stated, both at the hearing and in its subsequent sentencing memorandum, that it was going to impose a sentence other than that contemplated by the Guidelines and sentenced Gall to 36 months' probation. In imposing the sentence of probation, the court stated that it had considered the § 3553(a) factors. Particularly, the court stated that it took into account "the defendant's voluntary and explicit withdrawal from the conspiracy in September of 2000; the defendant's exemplary behavior while on bond; the support manifested by family and friends who have attested to the defendant's character; the lack of criminal history, especially a complete lack of any violent criminal history; and the immaturity of the defendant."

Regarding the nature and circumstances of the offense under § 3553(a)(1), the district court noted that Gall had withdrawn from the conspiracy, the offense did not involve violence or firearms, and the offense level was derived solely on the basis of drug amounts.

As to the character of the defendant, the court stated that all of Gall's criminal conduct, including the present offense, occurred when he was 21 years old or younger, citing the Supreme Court's analysis in *Roper v. Simmons*, 543 U.S. 551, 569 (2005), that studies indicate that adolescents are less culpable than adults for their actions and "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualitites often result in impetuous and ill-considered actions and decisions." While acknowledging the decision's limited applicability to those who commit a death-eligible crime before the age of 18, the district court concluded that a National Institute of Health Study "confirms there is no bold line demarcating at what age full maturity is reached." Therefore, the court determined that Gall's age at the time of the offense should be considered in "discovering the overall characteristics of the defendant."

In addition, the court noted Gall's "exemplary" post-offense behavior, including earning his college degree and owning his own business. The court referred to the correspondence it had received, which described Gall as "reliable, honest, friendly, and polite" with "superior work ethic and valuable resources." The district court stated that it could "only conclude from the defendant's post-offense conduct that he has, in fact, learned from his experience with the United States criminal justice system and admirably moved to secure a better future for himself."

Finally, under § 3553(a)(2)(A), the court considered the need for the sentence imposed to reflect the seriousness of the offense. The court stated that the best way to accomplish this goal was to impose a term of probation because "[a]ny term of imprisonment in this case would be counter effective by depriving society of the

contributions of the Defendant who, the Court has found, understands the consequences of his criminal conduct and is doing everything in his power to forge a new life."

The district court sentenced Gall to a term of 36 months' probation as a reflection of "the seriousness of joining a conspiracy to distribute MDMA or Ecstacy." Recognizing that probation is not recommended when the Guidelines range falls outside of Zone A, the district court concluded that probation was nevertheless appropriate because Gall's offense level was based "solely on drug quantity." The court stated, "While not denigrating the seriousness of the offense conduct in this case, the Court finds the offense level based solely upon drug quantity does not adequately reflect the offense conduct."

The government now appeals, arguing that the sentence is unreasonable in light of all of the § 3553(a) factors because the district court (1) gave unreasonable weight to Gall's withdrawal from the conspiracy; (2) improperly relied on studies showing that adolescents are less culpable for their actions than adults; (3) gave unreasonable weight to Gall's post-offense rehabilitation and behavior while on pre-trial release; (4) failed to acknowledge that Gall's lack of criminal history was accounted for in the Guidelines calculation; (5) incorrectly concluded that a sentence of probation reflects the seriousness of the offense; (6) did not consider whether a sentence of probation affords adequate deterrence to future criminal conduct; and (7) did not consider whether a sentence of probation creates unwarranted sentencing disparities among defendants with similar records who committed similar crimes.

II. *Discussion*

"Under *Booker*, the sentencing guidelines are no longer a mandatory regime. Instead, the district court must take the advisory guidelines into account together with other sentencing factors enumerated in 18 U.S.C. § 3553(a)." *United States v. Claiborne*, 439 F.3d 479, 480 (8th Cir. 2006). To determine the proper sentence, "the district court must first calculate the applicable guidelines sentencing range." *Id.*

After calculating the advisory Guidelines range, the district court "may then impose a sentence outside the range in order to 'tailor the sentence in light of the other statutory concerns' in § 3553(a)." *Id.* (quoting *United States v. Booker*, 543 U.S. 220, 245–46 (2005)).

In the present case, neither party challenges the district court's determination of the Guidelines sentencing range; therefore, "we review the resulting sentence for reasonableness, a standard akin to our traditional review for abuse of discretion." *Id.* at 481.

"We have determined that a sentence imposed within the guidelines range is presumptively reasonable." *United States v. Myers*, 439 F.3d 415, 417 (8th Cir. 2006). "While it does not follow that a sentence outside the guidelines range is unreasonable," a sentence outside of the Guidelines range "'may be unreasonable if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper factor or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.'" *Id.* at 417–18 (quoting *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir. 2005).

The district court must clearly explain why it imposed a sentence outside of the Guidelines range. *United States v. Gatewood*, 438 F.3d 894, 896 (8th Cir. 2006). While we do not require "a rote recitation of each § 3553(a) factor," the district court should explain why it varied from the Guidelines and the extent of the variance. *Id.* "'Sentences varying from the guidelines range . . . are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. 3553(a). How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed.'" *Claiborne*, 439 F.3d. at 481 (quoting *United States v. Johnson*, 427 F.3d 423, 426–27 (7th Cir. 2005)). Therefore, "the farther the district court varies from the presumptively reasonable guidelines

range, the more compelling the justification based on the § 3553(a) factors must be." *United States v. McMannus*, 436 F.3d 871, 874 (8th Cir. 2006).

Here, the district court imposed a sentence of probation when the bottom of Gall's advisory Guidelines range was 30 months' incarceration. In essence, this amounts to a 100% downward variance, as Gall will not serve any prison time. Such a variance is extraordinary. "An extraordinary reduction must be supported by extraordinary circumstances." *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005); *see also Claiborne*, 439 F.3d at 481 (holding that the district court's imposition of a 15-month sentence when the Guidelines range was 37 to 46 months' imprisonment, a 60% downward variance, was unreasonable). We conclude that this extraordinary variance is not supported by extraordinary justifications.

First, the district court gave too much weight to Gall's withdrawal from the conspiracy because the court failed to acknowledge the significant benefit Gall received from being subject to the 1999 Guidelines. Gall was held responsible for 10,000 tablets of MDMA at a conversion rate of 1 gram of MDMA to 35 grams of marijuana, resulting in a base offense level of 24. Under the current Guidelines, however, Gall's base offense level would have been 32 because 1 gram of MDMA equates to 500 grams of marijuana. In addition, Gall was not held accountable for quantities of ecstasy distributed by other members of the conspiracy subsequent to his withdrawal. Under U.S.S.G. § 1B1.3, Gall could have been held responsible for other members' reasonably foreseeable acts. *United States v. Smith*, 240 F.3d 732, 737 (8th Cir. 2001) ("A defendant convicted of conspiracy is properly held accountable for all reasonably foreseeable acts and omissions of any co-conspirator taken in furtherance of the conspiracy.").

Second, the district court gave significant weight to an improper factor when it relied on general studies showing persons under the age of 18 display a lack of maturity, which often results in impetuous and ill-considered actions. This general study, however, does not explain how Gall's specific behavior in the instant case was

impetuous or ill-considered. Furthermore, Gall sold ecstacy as a 21-year-old adult, not as an adolescent.

Third, the district court did not properly weigh the seriousness of Gall's offense. While the district court observed that Gall's offense level did not adequately reflect the offense conduct because it was based "solely on drug quantity," the district court ignored the serious health risks ecstasy poses. Ecstasy causes increased body temperature, which can lead to liver, kidney, and cardiovascular system failure; increases in heart rate and blood pressure; and severe anxiety and depression, which can occur days or weeks after taking ecstasy. *National Institute on Drug Abuse,* (2003), *at* www.nida.nih.gov/infofax/ecstasy.html (last visited March 31, 2006). Gall sold 10,000 ecstasy pills during the time he participated in the drug conspiracy. The potential harm posed by this quantity of illegal drugs should not be lightly discounted.

Fourth, the record does not show that the district court considered whether a sentence of probation would result in unwarranted sentencing disparities. *See* 18 U.S.C. § 3553(a)(6). "Congress has made avoiding unwarranted disparity a legislative priority." *United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir. 2006). Therefore, we find that the district court failed to consider a relevant factor that should have received significant weight.

Finally, the district court placed too much emphasis on Gall's post-offense rehabilitation. Even if Gall's rehabilitation "is dramatic and hopefully permanent," a sentence of probation for participating as a middleman in a conspiracy distributing 10,000 tablets of ecstasy with a personal profit of $30,000 "'lies outside the limited range of choice dictated by the facts of the case.'" *Id.* (quoting *Haack*, 403 F.3d at 1004).

III. *Conclusion*

Accordingly, the judgment of the district court is reversed and the case is remanded to the district court for resentencing.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, v. BRIAN MICHAEL GALL, Defendant.	*	4:04-cr-116 SENTENCING MEMORANDUM

I. INTRODUCTION

On May 27, 2005, this Court sentenced the Defendant, Brian Michael Gall to a thirty-six month term of probation. This memorandum sets forth the methodology and reasoning for that sentence.

On March 2, 2005, the Defendant pleaded guilty to one count of conspiracy to distribute MDMA, also known as "ecstacy", a Class C felony. *See* 21 U.S.C. §§ 846, 841(b)(1)(C). In fashioning a sentence that is "sufficient, but not greater than necessary, [the Court must consider] the nature and circumstances of the offense and the history and characteristics of the defendant . . . ." 18 U.S.C. § 3553(a)(1). Further, the Court must consider the need for the sentence imposed, in that it should: reflect the seriousness of the offense, promote respect for the law, and provide just punishment; afford adequate deterrence to criminal conduct; protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment. 18 U.S.C. § 3553(a)(2). Along with these factors, the Court must determine the kinds of sentences available, including those advised by the Sentencing Commission. 18 U.S.C. §§ 3553(a)(3)-(5); *see United States v. Yahnke*, 395 F.3d 823, 824 (8th Cir. 2005) (requiring that a

sentencing court "must consult Guidelines and take them into account when sentencing"); *United States v. Mathijseen*, 406 F.3d 496, 498 (8th Cir. 2005) (reviewing a district court's interpretations of the Guidelines *de novo*, factual findings for clear error, and the final sentencing determination for reasonableness). The Court must also "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" and assess the need to provide restitution to victims. 18 U.S.C. §§ 3553(a)(6), (7). Finally, because a term of imprisonment is available in this case, the Court must heed the statutory admonition "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a).

II. DISCUSSION

A. Advisory Guidelines Range

The Presentence Report calculation, which the Court adopts, subjects the Defendant to a total offense level of 24 based on the quantity of 10,000 MDMA tablets stipulated to by the parties. This amount converts to 87.5 kilograms of marijuana. The Defendant, however, received a two-point reduction under U.S.S.G. § 5C1.2 for being "safety valve" eligible. The Defendant also received a three-point adjustment for acceptance of responsibility. Taking these reductions into account, the final offense level calculation is 19.

The Defendant's criminal history is minimal, falling into criminal history category one ("I"). The Defendant's single criminal history point arises from conduct when, at the age of eighteen, the Defendant paid a fine for failure to zip a gun bag, which lay inside a motor vehicle while on a hunting trip. The Defendant pled guilty to two other infractions, as will be discussed below, but the associated conduct did not earn the Defendant any criminal history points under the Guidelines. Accordingly, the

advisory Guidelines sentencing range for this Defendant is between 30 and 37 months.

B. Departure Motions

The Defendant made several motions for downward departures from the Guidelines calculation above based on the Defendant's age, cooperation with the government,[1] remorse, and post-offense rehabilitation. Because these factors are more aptly considered under the statutory factors listed in 18 U.S.C. § 3553(a), they are denied. The Defendant also moves for a downward departure based on acceptance of responsibility. Since he has already received a three-point reduction for acceptance, that motion is also denied. *See* U.S.S.G. § 5K2.0(d) (prohibiting such a departure because it is already taken into account under § 3E1.1). Finally, the Defendant moves for downward departures based on the arguments that the Defendant's offense conduct was aberrant and that the Defendant voluntarily withdrew from the conspiracy well before the Indictment was filed in this case.

The Court cannot conclude the Defendant's offense conduct was aberrant behavior and, therefore, declines to downwardly depart on that basis. Under the policy statement, a court may depart downward "if the defendant committed a single criminal occurrence or single criminal transaction that: 1) was committed without significant planning; 2) was of limited duration; and 3) represents a marked deviation by the defendant from an otherwise law-abiding life." U.S.S.G. § 5K2.20. The facts, as stipulated by the parties, show that Defendant's offense conduct involved a conspiracy that

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[1] The Government filed no substantial assistance motion in this case. The Government conceded that, while the Defendant was receptive to providing testimony at the trials of co-defendants and other information, since his offense conduct occurred almost four years before the Indictment was filed, whatever information the Defendant could reveal was of little use. Ironically, by the time the Defendant provided information, the individuals he knew about had already confessed or were cooperating themselves.

lasted for at least seven months and included numerous criminal transactions. Conspiracy, by its very nature, almost completely forecloses a finding of aberrant behavior as a basis for downward departure because it invariably involves a degree of planning and is not, except in rare cases, an act of limited duration.

Neither can the Court find the Defendant's voluntary termination from the conduct prior to law enforcement intervention constitutes a basis for departing downward. The Defendant relies on *United States v. Nunemacher*, 362 F.3d 682, 689 (10th Cir. 2004), which allowed a district court to consider downwardly departing for a defendant's voluntary termination of criminal conduct before such conduct was brought to the attention of law enforcement. The Tenth Circuit reasoned that voluntary termination reflected that the criminal conduct was atypical and, therefore, worthy of consideration for a departure, if exceptional. *See id.* at 688 ("[V]oluntary termination of illegal activity and cooperation with law enforcement are already taken into account by an acceptance of responsibility adjustment . . . thus may not serve as a basis for departure unless [they] are present to an exceptional degree.") (citing *United States v. Benally*, 215 F.3d 1068, 1075 (10th Cir. 2000)). Voluntary termination likewise comes under consideration in the Eighth Circuit when a defendant's acceptance of responsibility is an issue. *United States v. Card*, 390 F.3d 592, 594 n.3 (8th Cir. 2004) (relying on a district court's application of U.S.S.G. 3E1.1 n.1(b) to determine whether a defendant accepted responsibility for his conduct). Here, the Defendant has already received a three-point reduction in his offense level for acceptance and his voluntary termination, after seven months and numerous criminal transactions, cannot be said to be so exceptional as to make his criminal conduct atypical. The Defendant's withdrawal from the conspiracy is better discussed within the confines of 18 U.S.C. § 3553(a).

C. Imposition of Sentence

1. *The Nature and Circumstances of the Offense*

The Defendant is charged with entering and exiting a conspiracy that involved the distribution of MDMA. The overall conspiracy occurred from May, 1996 to on or about October 30, 2002. The Defendant's involvement began with the purchase, for the purpose of distribution, of MDMA in February, 2000. The Defendant's involvement ended in September, 2000. In September, 2000, the Defendant informed a coconspirator that he was getting out of the drug business and wanted nothing more to do with the conspiracy. No other aggravating factors are present. None of the offense conduct involved violence, nor were firearms present. The offense level is derived solely on the basis of drug amounts. The Defendant believed that, up until the Indictment was filed in April, 2004, his criminal conduct was all part of the past.

2. *The Character of the Defendant*

The Defendant's criminal-history conduct has been alluded to and appears to stem from his addictions to drugs and alcohol. Other than the firearm offense discussed above, the Defendant pleaded guilty, at the age of eighteen, to failure to maintain control of his vehicle and was ticketed for underage drinking of alcohol. In March, 2000, contemporaneous with the time of the offense conduct in the present case, the Defendant pleaded guilty to possession of marijuana, for which he received a one year deferred judgment. In fact, all of the Defendant's criminal conduct, including the present offense, occurred when he was twenty-one-years old or younger.[2]

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[2] Immaturity at the time of the offense conduct is not an inconsequential consideration. Recent studies on the development of the human brain conclude that human brain development may not

To the Defendant's credit, he voluntarily and explicitly withdrew from the conspiracy in September, 2000.[3] In addition, the Defendant's post-offense behavior has been exemplary. The Defendant continues to wage a successful battle against drug and alcohol addictions; he has remained sober while on bond under pre-trial and pre-sentence release. After turning his back on the conspiracy, the Defendant earned his bachelor of science degree in computer science from the University of Iowa. The Defendant started, and continues to own and operate BMG Construction

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become complete until the age of twenty-five. *See* Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, Wash. Post, Feb. 1, 2005 at A01 (summarizing a recent National Institutes of Health ("NIH") study that suggests "that the region of the brain that inhibits risky behavior is not fully formed until age 25"). This is of critical importance in the area of criminal law. The Sentencing Commission, in its studies, has deduced that recidivism rates drop as the age of defendants increase. *See United States v. Nellum*, No. 2:04-cr-30-ps, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005). The Supreme Court based its most recent death penalty decision, *Roper v. Simmons*, on studies indicating adolescents are less culpable for their actions than adults. *See* 125 S. Ct. 1183, 1195 (2005) (stating that "as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' (citations omitted) It has been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behavior.'") (quoting Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Review 339 (1992)). While the *Roper* court held imposition of the death penalty is unconstitutional for those persons who committed the death-eligible crime before the age of eighteen, the recent NIH report confirms that there is no bold line demarcating at what age a person reaches full maturity. While age does not excuse behavior, a sentencing court should account for age when inquiring into the conduct of a defendant.

[3] The Government estimates that the Defendant made between $30,000 and $40,000 during his time in the conspiracy. Like so many facts to be considered when a court imposes a sentence, this fact can be viewed from different perspectives. On the one hand, the Defendant should be punished for profiting from a criminal scheme. The Government argues that this can best be met by a sentence near the bottom of the advisory Guidelines sentencing range, i.e., thirty months imprisonment. On the other hand, the Defendant, who is from a working-class family and has few financial resources, decided to turn his back on what, for him, was a highly profitable venture. The Presentence Report, paragraph 72, characterizes the profits as "easy money." The Court can not consider, for the purposes of sentencing, one side of the financial aspect of the offense conduct without considering the other.

Services, which operates as a sub-contracting service for the installation of Pella-brand windows and doors. Representatives of the Pella Corporation have written to the Court describing the Defendant as "reliable, honest, friendly, and polite," with a "superior work ethic . . . and a valuable resource." Soon the Defendant's company will begin a significant construction project, the replacement of windows and doors at Northwestern University in Evanston, Illinois. The Court has also received a small flood of letters from family, friends, and work colleagues attesting to the Defendant's character.

3. *The Need for the Sentence Imposed*

The Court can only conclude from Defendant's post-offense conduct that he has, in fact, learned from his experience with the United States criminal justice system, and has admirably moved to secure a better future for himself. The Court, however, is bound to impose a sentence that reflects the seriousness of joining a conspiracy to distribute MDMA. This is best accomplished, in this case, by a term of Probation for three years with appropriate conditions. *See* 18 U.S.C. § 3561(a) (allowing for probation for offenses other than Class A or Class B felonies). The Court reminds the Defendant that "probation is not an act of leniency. Probation is a substantial restriction of freedom, it is not forgiveness, and it is not an endorsement of the offense." *State v. Peckenschneider*, 236 N.W.2d 344, 353 (Iowa 1975) (McCormick, J., dissenting). The Defendant will have to comply with strict reporting conditions along with a three-year regime of alcohol and drug testing. He will not be able to change or make decisions about significant circumstances in his life, such as where to live or work, which are prized liberty interests, without first seeking authorization from his Probation Officer or, perhaps, even the Court. Of course, the Defendant always faces the harsh consequences that await if

he violates the conditions of his probationary term.[4]

Any term of imprisonment in this case would be counter effective by depriving society of the contributions of the Defendant who, the Court has found, understands the consequences of his criminal conduct and is doing everything in his power to forge a new life. The Defendant's post-offense conduct indicates neither that he will return to criminal behavior nor that the Defendant is a danger to society. In fact, the Defendant's post-offense conduct was not motivated by a desire to please the Court or any other governmental agency, but was the pre-Indictment product of the Defendant's own desire to lead a better life. Indeed, a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.

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[4] Along with the mandatory conditions of probation, the Court also provides the following conditions under 18 U.S.C. § 3563(b), which are in keeping with the factors set forth in §§ 3553(a)(1) and (a)(2): 1) You shall participate in a program of testing and treatment for substance abuse, as directed by the Probation Officer, until such time as you are released from the program by the Probation Office; 2) You shall not use alcohol and/or other intoxicants during and after the course of treatment; 3) You shall submit to a mental health evaluation and participate in treatment, if recommended, which may include compliance with any medical regime recommended by treatment personnel, as directed by the Probation Officer; 4) You shall not patronize business establishments where more than fifty percent of the revenue is derived from the sale of alcoholic beverages; and 5) You shall work only at employment approved by the U. S. Probation Office. You shall consult the U. S. Probation Office prior to any changes in employment. You shall not terminate any employment without prior approval from the U. S. Probation Office.

III. CONCLUSION

The introductory commentary to Part B - Probation of the Sentencing Guidelines states that: "Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet the fully statutory purposes of sentencing, including promoting respect for the law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant." The Court recognizes that, according the Sentencing Guidelines, Probation is not recommended when, as in this case, the Guidelines range falls outside of Zone A.[5] Nevertheless, the Court finds that the circumstances of the offense and the

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[5] This is because the offense level in this case, based solely on drug quantity, subjects the Defendant to a final offense level of 19. Other courts have recognized, however, that for a variety of reasons, the Guidelines calculations based on drug amount may overrepresent the actual offense conduct. *See United States v. Smith*, 359 F. Supp. 2d 771, 776 (E.D. Wis. 2005) (noting that defendant's offense level would have been reduced by six levels if he was responsible for powder instead of crack cocaine); *United States v. Nellum*, No. 2:04-cr-30-ps, 2005 WL 300073 at *5 (N.D. Ind. Feb. 3, 2005) (describing the system of drug quantities as random as it is played out in reality); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1026 n.6 (D. Neb. 2005) (stating that "the quantity system was developed to punish bigger distributors more harshly, but practice of charging conspiracies over a long period of time has the result of aggregating many small distributions so as to make a long-term small quantity distributor look like a large-quantity distributor"). While not denigrating the seriousness of the crime in the present case, the Court finds the offense level, based solely on drug quantity, does not adequately reflect the offense conduct.

The Government argues that, because the offense level in this case is derived from the 1999 Guidelines and not a subsequent Guidelines, the Defendant already receives a benefit. Because, had the conduct occurred later, the Defendant would be subject to a higher sentencing range. This reasoning stems from harsher Guidelines sentencing ranges in drug trafficking cases based on drug amounts. This is no argument. The "benefit" of the 1999 calculation incurred by the Defendant was the result of his own decision to withdraw from the conspiracy. The Sentencing Commission did not raise the offense level associated with the same drug quantity in order to benefit those who had already committed the crime or to somehow reward them for engaging in earlier criminal conduct, but to reflect Congressional intent to toughen sentences for those involved in drug trafficking.

character of the Defendant, for the reasons set forth above, warrant a sentence of Probation as being sufficient, but not greater than necessary, to comply with the statutory mandates of 18 U.S.C. § 3553(a).

Dated this ___2nd___ day of June, 2005.

Robert W. Pratt

ROBERT W. PRATT
U.S. DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-3001

United States of America,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
v.	*	Rehearing and for Rehearing
	*	En Banc
Brian Michael Gall,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Steven M. Colloton took no part in the consideration or decision of this matter.

(5128-010199)

July 7, 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

No. 06-7949

IN THE SUPREME COURT OF THE UNITED STATES

BRIAN MICHAEL GALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

No. 06-7949

BRIAN MICHAEL GALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that the standards applied by the court of appeals in reviewing his below-Guidelines sentence for unreasonableness are inconsistent with United States v. Booker, 543 U.S. 220 (2005). On November 3, 2006, this Court granted certiorari in Claiborne v. United States, No. 06-5618, and Rita v. United States, No. 06-5754, to address various aspects of sentencing procedure under Booker, including, in Claiborne, the standards to be applied in reviewing a below-Guidelines sentence for unreasonableness. Accordingly, the petition for a writ of certiorari should be held pending the Court's resolution of Claiborne and Rita, and then disposed of as appropriate in light

of the decisions in those cases.[1]

PAUL D. CLEMENT
Solicitor General

DECEMBER 2006

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[1] The government waives any further response to the petition unless this Court requests otherwise.

(3)

No. 06-7949

FILED
JUL 26 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

BRIAN MICHAEL GALL, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Families Against Mandatory Minimums (FAMM) is a national nonprofit, nonpartisan organization. FAMM's primary mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing thousands of individuals and families whose lives have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform.

FAMM promotes sentencing policies that give judges discretion to distinguish among defendants and to sentence them according to their role in the offense, the seriousness of the offense, the potential for rehabilitation, and the characteristics of the offender. In short, FAMM believes that the punishment always must fit the crime. FAMM's vision is a nation in which sentencing is individualized, humane, and *sufficient but not greater than necessary* to impose just punishment, secure public safety, and support the successful rehabilitation and reentry of offenders.

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

Properly understood and applied, this Court's decisions in *United States* v. *Booker*, 543 U.S. 220 (2005), and *United States* v. *Rita*, 127 S. Ct. 2456 (2007), represent important steps in that direction. FAMM believes that, in contrast, the Eighth Circuit's decision in this case is flatly inconsistent with those rulings and the Sixth Amendment.

SUMMARY OF ARGUMENT

I. The core congressional command in 18 U.S.C. § 3553(a) is that district courts must "impose a sentence sufficient, but not greater than necessary, to comply" with specified purposes of punishment. The statutory language is an elegant distillation of one of the most long-established and influential maxims in criminology: the principle of parsimony. That principle, which provides that punishment should *never* exceed the minimum necessary to effect its purposes, has deep roots in American soil. It was well known to the founding generation through the work of the Italian criminologist Cesare Beccaria, who borrowed the concept from Montesquieu, as well as the English philosopher Jeremy Bentham. The maxim was given new currency in the twentieth century and was one of the foundational ideals for a number of reform-minded criminal law scholars whose efforts culminated in the Sentencing Reform Act of 1984 (SRA).

The principle of parsimony has now reasserted itself in light of *Booker*. By excising the conflicting command requiring district courts to hew to the Sentencing Guidelines, the remedial majority in *Booker* left the principle of parsimony as the sole binding substantive feature of the statutory sentencing scheme. Federal courts must follow that congressional command at every step of the sentencing proc-

ess just as they were required to follow the Guidelines before *Booker*.

II. As construed by this Court's decisions in *Booker* and *Rita*, the SRA provides different, but complementary, roles for the district and appellate courts in the system of federal sentencing.

Together, *Booker* and *Rita* establish certain bedrock principles. The first is that, under the unitary standard of appellate review established in *Booker*, no presumption in favor of a Guidelines sentence binds the district court. Although the properly calculated guideline range is a factor to be considered in all cases, it is *not* a tether, anchor, or baseline. The second principle, which follows from the first, is that regardless of whether the sentence is inside or outside the guideline range, that sentence is entitled to substantial deference on appellate review. Accordingly, the district court is the primary actor in the sentencing process and retains considerable discretion, subject to the requirements of § 3553(a), in selecting an appropriate sentence.

The obligation of a district judge is to impose an individualized sentence that "consider[s]" the various factors set forth in § 3553(a), giving those factors the weight the judge thinks appropriate in the circumstances, subject to the overarching requirement of parsimony. This consideration requirement reflects the overriding importance of two indispensable elements of just sentencing: reasoned judgment and individualized tailoring. Section 3553(a) compels sentencing judges to think carefully about the general purposes of punishment; the history and characteristics of the offender; the nature of the offense; and the views of the Sentencing Commission. Judges must

then exercise reasoned discretion to tailor a sentence for the particular person who stands before them, and ultimately provide a statement of reasons for the sentence under 18 U.S.C. § 3553(c) that reflects compliance with the statutory directives.

In turn, the purpose of appellate review in this scheme is simply, but importantly, to ensure that district courts do not act unreasonably under those statutory requirements. Appellate review is not designed to, and may not, surreptitiously resuscitate the system of binding Guidelines rejected in *Booker*. Thus, whether a sentence falls within a guideline range, above it, or below it, the same criteria should be applied in determining whether a sentence is reasonable. If the appellate court is satisfied that a procedurally correct sentence has been imposed, further review of the sentence for reasonableness should be guided by two principles. First, to ensure that a court of appeals retains an ability to remedy a true outlier sentence, while ensuring that the appellate court does not substitute its judgment for the decision of the judge who actually looked the defendant in the eye, the appellate court should be permitted to review the sentencing result only under the deferential standard described by this Court in *Koon* v. *United States*, 518 U.S. 81 (1996).

Second, because a district court's primary task is to comply with the parsimony requirement in § 3553(a), the reviewing court should always ask itself whether the district judge imposed the least restrictive sanction necessary to achieve the specified purposes of sentencing. If the court of appeals is *not* convinced that the district judge reasonably concluded that he or she imposed the least severe pun-

ishment necessary to satisfy the specified purposes of sentencing, then the sentence should be vacated.

III. Given the overriding importance of parsimony and § 3553(a)'s requirement that district courts individually consider a range of specified sentencing factors, there is no basis for requirements, such as those imposed by the Eighth Circuit, that a significantly out-of-guideline sentence be justified by "extraordinary circumstances" and that greater justification is required the more the sentence varies from what the court of appeals called the "presumptively reasonable" guideline range. Indeed, those requirements replicate the kind of unconstitutional sentencing regime struck down by this Court in *Blakely* v. *Washington*, 542 U.S. 296 (2004) and again in *Booker*, and are indistinguishable from the "presumption of unreasonableness" for non-Guidelines sentences that this Court rejected in *Rita*.

ARGUMENT

I. Congress Has Directed That The Principle Of Parsimony, Which Has Roots In Our Nation's Founding, Must Be The Touchstone For All Sentencing Decisions.

In 18 U.S.C. § 3553(a), Congress required that district courts "impose a sentence sufficient, but not greater than necessary, to comply" with specified purposes of punishment. Far from being empty verbiage, that imperative—the principle of parsimony—has a long and distinguished intellectual pedigree.

A. "All punishment which is not derived from necessity," wrote Montesquieu in 1748, "is tyrannical." Baron Charles de Montesquieu, *The Spirit of the Laws*, Bk. XIX.14 (G. Bell & Sons, Ltd. 1914). This

simple but profound idea was to have immense influence on criminal law reformers from the eighteenth century to the twentieth. Indeed, *Spirit of Laws* "was one of the first works to treat the problem of criminal law critically and extensively, and, as such, is considered to be of great importance to the 18th century movement for criminal law reform." Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems *v.* United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 811 (1975).

Writing in 1764, the great Italian criminologist Cesare Beccaria openly acknowledged his debt to Montesquieu in formulating his own philosophy of punishment:

> Every punishment, which does not arise from absolute necessity, says the great Montesquieu, is tyrannical. A proposition which may be made more general thus. Every act of authority of one man over another, for which there is not an absolute necessity, is tyrannical. It is upon this then, that the sovereign's right to punish crimes is founded; that is, upon the necessity of defending the public liberty, entrusted to his care, from the usurpation of individuals; and punishments are just in proportion, as the liberty, preserved by the sovereign, is sacred and valuable.

Cesare M. Beccaria, *An Essay On Crimes and Punishments* 20 (Adolph Caso ed. 1984) ("*Beccaria*"). Beccaria's basic insight, which he derived from Rous-

seau's theory of the social contract, was that each individual, in forming political society, "would choose to put into the public stock the smallest portion possible" of his liberty, "as much only as was sufficient to engage others to defend it." *Id.* at 20-21. For that reason, punishment must be strictly limited to the minimum necessary to preserve public peace and security, for "all that extends beyond this, is abuse, not justice." *Id.* at 21. Beccaria thus argued that all punishments that "exceed the necessity of preserving" the bonds holding individuals together in society "are in their nature unjust." *Id.*

Influenced by Beccaria, the English philosopher Jeremy Bentham advocated a very similar doctrine, although he justified it in more overtly utilitarian terms. "The last object is, whatever mischief is guarded against, to guard against it at as cheap a rate as possible: therefore *the punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given.*" Jeremy Bentham, AN INTRODUCTION TO THE PRINCIPLES AND MORALS OF LEGISLATION, ch. XIV, para.13 (1781) (emphasis added). Parsimony, according to Bentham, derives from a straightforward cost-benefit calculus: among equally effective means to achieve a given end, those that are less costly or burdensome should be preferred. The fact that the same principle of punishment could be grounded in both the social-contract and the utilitarian traditions undoubtedly helps account for its widespread acceptance and importance in the years to come.

And, indeed, these thinkers and their ideas had an immense influence on the founding generation in America. "In every colony, the ideas and writings of

such social critics and reformers as Voltaire, Rousseau, Montesquieu, and Beccaria were known and often quoted." Schwartz & Wishingrad, *supra*, 24 BUFF. L. REV. at 813; see also *Ullmann* v. *United States*, 350 U.S. 422, 450 (1956) (Douglas, J., dissenting) (observing that "Beccaria, and his French and English followers, influenced American thought in the critical years following our Revolution."). An American edition of Beccaria's treatise possibly appeared as early as 1773, and certainly no later than 1776. See *Becarria* at 7 (Editor's Introduction). In the years between the signing of the Declaration of Independence and the ratification of the Constitution, "the book appeared in translation in practically every cultural center of Europe and America." *Id.* During this period, American lawyers and political leaders were making serious efforts at legal reform, attempting to bring American law into greater harmony with the principles of justice and liberty that animated the Revolution. See Schwartz & Wishingrad, *supra*, 24 BUFF. L. REV. at 814-16. More specifically, "a general perception existed that a need existed to ameliorate the criminal penalties." Erwin C. Surrency, *The Transition from Colonialism to Independence*, 46 AM. J. LEGAL HIST. 55, 79 (2004). The European theorists who advocated for parsimony in the meting out of criminal punishments provided much of the intellectual horsepower for these reform efforts. *Id.* at 78-79.

Thomas Jefferson, in particular, was deeply influenced by Beccaria. See Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 AM. J. LEGAL HIST. 35, 89 (2005). Jefferson's work in the 1770s as part of the Virginia Committee of Revisors for the reform of the

State's legal system drew on Beccaria's insistence on strict proportionality between punishment and crime. The annotations to Jefferson's 1778 "A Bill for Proportioning Crimes and Punishments" contain multiple references to Beccaria's treatise, and in a later letter, Jefferson noted that "'Beccaria, and other writers on crimes and punishments, had satisfied the reasonable world of the unrightfulness and inefficacy of [punishing] crimes by death.'" Schwartz & Wishingrad, *supra*, 24 BUFF. L. REV. at 818. John Adams was intellectually indebted to Beccaria as well. Adams owned a copy of the 1775 London edition of *On Crimes and Punishments*, and he thought highly enough of Beccaria's work both to give the book as a gift to his son in 1800, see *Beccaria* at 9 (Comments), and to quote Beccaria during his famous defense of the British soldiers accused of murder during the Boston Massacre, see Schwartz & Wishingrad, *supra*, 24 BUFF. L. REV. at 813-14.

B. As the text of § 3553(a) indicates, the Enlightenment-era insights of Montesquieu, Beccaria, and Bentham that punishment must be not greater than necessary to advance particular objectives are not some moribund historical curiosity. Through the work of scholars whose efforts at criminal law reform echoed that of the founding generation, the principle of parsimony was given new currency in the twentieth century. Foremost among these reformers was Norval Morris of The University of Chicago Law School. Morris's book, THE FUTURE OF IMPRISONMENT (U. Chicago Press 1974), identified parsimony as one of the basic norms that must guide any legitimate sentencing process. See generally Michael Tonry, *Preface*, 32 CRIME & JUSTICE vii, viii (2004) (describing Morris as "a criminal-justice institution

builder of unmatched influence, and his ideas about punishment have transformed the ways people think"). In Morris's influential formulation, the parsimony principle stated that "[t]he least restrictive or least punitive sanction necessary to achieve a defined social purpose should be chosen." Norval Morris, *The Future of Imprisonment: Toward A Punitive Philosophy*, 72 MICH. L. REV. 1161, 1162 (1974); see also Tonry, *supra*, 32 CRIME & JUSTICE at ix (explaining that "a principle of parsimony requires imposition of the least severe applicable punishment unless good, empirically grounded reasons exist for doing more"). Like Beccaria, Morris argued that parsimony is not merely a utilitarian virtue, but also a moral imperative. Morris thus wrote that a "system of criminal justice that is not infused with parsimony in punishment * * * creates an intolerable engine of tyranny." NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 155 (U. Chicago Press 1982).

Although Morris's influence has been unparalleled, he himself observed that he was hardly alone in advocating parsimony as the touchstone of sentencing. He noted that a presumption in favor of less severe punishments "pervades all recent scholarship and most legislative reforms. Justification for this utilitarian and humanitarian principle follows from the belief that any punitive suffering beyond social need is, presumably, what defines cruelty." Morris, *supra*, 72 MICH. L. REV. at 1163. Thus, in endorsing the parsimony principle, Morris was "on well-trodden ground"; the "American Law Institute's Model Penal Code, the American Bar Association's Project on Minimum Standards for Criminal Justice, and two recent national crime commissions have advocated parsimonious use of imprisonment." Andrew Ruth-

erford, *A Review of Norval Morris' The Future of Imprisonment*, 66 J. CRIM. L. & CRIMINOLOGY 380, 383 (1975).

The widespread acceptance of the parsimony principle in our own time should come as no surprise. Indeed, it seems almost intuitive to say that punishment not limited by the principle of parsimony is both immoral and wasteful; such punishment is "merely gratuitous, serving no legitimate purpose." Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 401 (2004). In pursuing the goal of parsimony, therefore, it must always be remembered that "punishment requires moral justification" and that "more punishment than necessary to the purpose of retribution is not justifiable." Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. REV. 973, 1015 n.123 (1985). Moreover, this emphasis on the need to justify a particular quantum of punishment against a set of defined goals illustrates that the parsimony principle includes both a substantive and a procedural dimension. Substantively, it "limits punishments to the least restrictive sanction possible," while procedurally, it "requires the state to prove why the offender deserves a particular punishment." *Id.* at 1015.

C. Just as parsimony is not an eighteenth century relic, neither does it find a home only in the academic library or lecture hall. To the contrary, it is now a congressional command. When Congress enacted the SRA in 1984, it distilled the philosophical idea of parsimony into the statutory requirement that district courts "*shall impose a sentence sufficient, but not greater than necessary*, to comply with

the purposes set forth in paragraph (2) of this subsection." 18 U.S.C. § 3553(a) (emphasis added). Implicitly acknowledging Morris's understanding that parsimony requires a set of defined social purposes for punishment, paragraph (2) seeks to capture the four generally accepted justifications of criminal punishment. These are: retribution (subparagraph (A)); deterrence (subparagraph (B)); incapacitation (subparagraph (C)); and rehabilitation (subparagraph (D)).

In light of the parsimony principle's history in American criminology, Congress's decision to include it in the SRA as an overarching concept is hardly surprising. In fact, given the central role that the parsimony principle occupied in sentencing reform circles in the years leading up to the enactment of the SRA (which was nothing less than an implementation of the Founders' values), it would have been more remarkable had the new law *not* placed such emphasis on the concept of parsimony.

As originally enacted, however, the command to impose sentences based on the principle of parsimony stood in direct tension with a rival statutory obligation. At the same time that § 3553(a) instructed judges to impose a parsimonious sentence, § 3553(b)(1) instructed them that the "the court shall impose a sentence of the kind, and within the range," provided by the applicable provision of the Sentencing Guidelines. *Booker*, 543 U.S. at 259 (Breyer, J.). In *Booker*, this Court noted the patent conflict between § 3553(a) and § 3553(b)(1): "While subsection (a) of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court '*shall*

impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases." 543 U.S. at 233-34 (Stevens, J.).

The tension created by these competing sentencing directives was a product of the SRA's convoluted legislative history and the realities of political compromise. The Senate was the primary force behind the federal sentencing reform effort, and most of the provisions of the final bill originated in that body. This was true of § 3553(b)(1). See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 271 & n.296 (1993). The parsimony directive, however, originated in the House of Representatives. A bill sponsored by Representative Conyers and reported out of the House Judiciary Committee in June 1984—a bill that was more in line with a system of advisory guidelines—included a provision directing judges "to impose the sentence (whether or not a departure from advisory guidelines) that *would be the 'least severe' sufficient to serve the purposes of sentencing.*" *Id.* at 262 (quoting H.R. 6012, 98th Cong., 2d Sess. (1984) (emphasis added)). In October 1984, "Senator Mathias succeeded in obtaining an amendment to add a new first sentence to the directives to the sentencing court along the lines suggested by Representative Conyers." *Id.* at 271. It was this amendment (cosponsored by Senator Thurmond) that added the "sufficient, but not greater than necessary" language eventually codified in § 3553(a). See *id.* at 271-72; 130 CONG. REC. 29,870 (1984).

Under the House bill, the obligation to sentence consistent with the principle of parsimony—rather than mandatory guidelines—would have been the primary command given to the district courts. Thus, where the Guidelines suggested a sentence that the court deemed more severe than necessary, the Guidelines would have had to give way. See Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 272. When the parsimony directive was added to the Senate bill, however, it was forced to vie for influence with what became § 3553(b)(1)'s command to abide by the Guidelines. Because Congress never addressed, much less resolved, the tension, *id.*, the courts and the Sentencing Commission were left to work it out.

But, instead of confronting the statutory contradiction as a problem to be solved through ordinary principles of construction, the courts "essentially ignored not only the parsimony language, but the entire set of congressional directives to judges in 3553(a)." Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 746 (1999). Indeed, the parsimony provision became "almost hortatory in practice when placed against the mandate that erects a presumption in favor of the guideline sentence." Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 272. The obligation to impose a Guidelines-compliant sentence thus ultimately trumped the requirement of parsimony. That triumph of § 3553(b)(1) was ensured primarily by two factors: this Court's repeated admonitions that the Guidelines were to be followed, see, *e.g.*, *Stinson* v. *United States*, 508 U.S. 36, 42 (1993); and the ever-present threat of appellate reversal for judges who strayed from what the Guidelines required, see 18

U.S.C. § 3742(e)(3)(B)(ii); *Mistretta* v. *United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

All of that changed, however, with the decision in *Booker*. The remedial majority opinion resolved the conflict between the parsimony directive and the mandatory Guidelines sentencing command by invalidating the two provisions of the SRA that had kept the parsimony directive from playing its proper role in the federal sentencing process for the previous two decades. *Booker*, 543 U.S. at 259 (Breyer, J.) (severing and excising § 3553(b)(1) and § 3742(e) to bring the SRA into compliance with the Sixth Amendment). The result of this statutory surgery is that the parsimony directive in § 3553(a) now stands as the sole substantive mandate that binds district judges when they impose sentences. *Id.* at 261. Federal courts therefore must take the congressional command of parsimony seriously at every step of the sentencing process. In this sense, the SRA now resembles something akin to the original House bill described above. As in that bill, the Guidelines now exist *only* as advisory provisions that a sentencing court must consider, but before which it need not bow. See *Rita* v. *United States*, 127 S. Ct. at 2466-67. The parsimony directive has prevailed, and the obligation to impose a sentence "sufficient, but not greater than necessary" to achieve the specified purposes of sentencing is preeminent. When, in the judgment of the sentencing court, that obligation clashes with the sentence suggested by the Guidelines, it is now the Guidelines that must give way.

II. Federal Sentencing Must Be Guided By Reasoned Judgment, Individualized Consideration, And Deferential Appellate Review—All Subject To The Overarching Command Of Parsimony.

Beyond making clear that the Guidelines are no longer binding—and thus enabling the parsimony principle in 18 U.S.C. § 3553(a) finally to take center stage—this Court's decisions in *Booker* and *Rita* establish two crucial propositions with profound implications for federal sentencing.

First, "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." *Rita*, 127 S. Ct. at 2465. Thus, although the district court still must calculate the advisory guideline range, there is no thumb on the scale in favor of imposing a within-guideline sentence. In other words, although a properly calculated guideline range is a factor that a sentencing court must always consider, the court is forbidden in all cases from treating that range as a tether or touchstone.

Second, whether the district court selects a sentence inside or outside the advisory guideline range, the sentence ultimately imposed (as long as it results from a process that complies with the statutory directives, including the obligation to provide a sufficient statement of reasons under § 3553(c)) is entitled to substantial deference on appellate review. See *Rita*, 127 S. Ct. at 2472-73 (Stevens, J., concurring). An appellate court thus may not begin its review with the presumption that a sentence outside the guideline range is unreasonable, unworthy of

deference, or requires special justification. *Id.* at 2467.

A. The upshot of these principles is that the primary actor in the sentencing process is the district judge. In imposing sentence, he or she is to be guided not by any artificial presumptions, but instead by the factors set forth in 18 U.S.C. § 3553(a) and, of course, by the overriding mandate of parsimony. To discharge that statutory mandate, the sentencing court first must "consider" each of the enumerated factors, insofar as they are relevant, and determine how each of them would (or would not) be advanced by reducing (or increasing) a quantum of punishment.

This process offers an occasion for the sentencing judge to make a reasoned moral choice about how to punish a particular defendant most appropriately in light of all the facts and circumstances of his or her case. It ensures *both* that the ultimate sentence is appropriate for the individual defendant *and* that it is the product of a clear and established set of principles and standards. In this way, the statutory requirements reflect the importance of two basic components of just sentencing: individualized tailoring and reasoned judgment.

Those requirements have the additional virtue of forcing the sentencing court to take full moral and legal responsibility for the sentence imposed. No longer can a judge deflect responsibility onto the bureaucracy of the Sentencing Commission or take refuge behind a numerical grid. Such direct accountability requires the exercise of "deliberation and moral judgment," Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*,

91 NW. U.L. REV. 1247, 1256 (1997)—something that is at the core of judging, but that has been lost in the era of mandatory Guidelines.

B. In turn, the purpose of appellate review in this scheme is simply, but importantly, to ensure that district judges do not stray from those statutory requirements. Appellate review is not, and may not be, an exercise aimed at surreptitiously restoring a regime of effectively mandatory Guidelines. Nor does it provide an occasion for appellate judges to substitute their judgment for that of district judges who have faced defendants personally, evaluated their circumstances and the circumstances of their crimes, and passed sentence accordingly. It follows that the same deferential standards must be applied to assess the validity of a sentence, regardless of whether it falls within the guideline range, above the range, or below it. That is why, as *Booker* suggested and *Rita* confirmed, appellate review of *all* sentencing determinations is now to be governed by a unitary abuse-of-discretion standard.

Before *Booker*, sentences were subjected to different standards of review depending on whether they fell inside or outside the applicable guideline range. By virtue of the PROTECT Act of 2003,[2] sentences outside the range were subject to de novo review and could be invalidated if the court of appeals deemed a departure legally impermissible or "unreasonable." 18 U.S.C. § 3742(e)(3), (f). In contrast, sentences within the range could be invalidated only if they were imposed "in violation of law" (for example,

[2] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401(d)(1), 117 Stat. 670.

if the district court erred in calculating the applicable range). 18 U.S.C. § 3742(e)(1). Under the pre-*Booker* regime, therefore, a sentence within a properly calculated guideline range was effectively unreviewable, in the absence of procedural error or a misapprehension of the scope of the court's discretion. See, *e.g.*, *United States* v. *Woodrum*, 959 F.2d 100, 101 (8th Cir. 1992) (per curiam); *United States* v. *Garcia*, 919 F.2d 1478, 1482 (10th Cir. 1990).

The PROTECT Act stands as the high-water mark of an unconstitutional federal sentencing regime. *Booker*, 543 U.S. at 261 (de novo standard of review was designed "to make Guidelines sentencing even more mandatory than it had been"). In excising § 3742(e) and imposing a single "reasonableness" standard to be applied "across the board," 543 U.S. at 263 (Breyer, J.), the remedial majority in *Booker* extended to all cases the abuse-of-discretion standard that had governed review of departures before the PROTECT Act. See *Rita*, 127 S. Ct. at 2465 ("'reasonableness' review merely asks whether the trial court abused its discretion"); *id.* at 2470-71 (Stevens, J., concurring). As Justice Stevens' concurring opinion in *Rita* states, appellate courts must "give deference to the sentencing decisions made by [district] judges, *whether the resulting sentence is inside or outside the advisory Guidelines range*, under traditional abuse-of-discretion principles." *Rita*, 127 S. Ct. at 2474 (Stevens, J., concurring) (emphasis added). The presumption of reasonableness upheld in *Rita* is thus best understood as an *example* of a larger principle of appellate deference to the district court. It is part and parcel of what amounts to a presumption in favor of affirmance that accompanies *any* discretionary decision made by a trial judge

more familiar with the circumstances of a particular case.

This Court's most complete explication of the principle of deference came in *Koon*, 518 U.S. 81. *Koon* held that an abuse-of-discretion standard applied on review of a departure from the then-mandatory guideline range. *Id.* at 96-100. Because the effect of *Booker*'s statutory surgery was to impose for *all* sentences the standard of review that *Koon* had applied to departures, an examination of *Koon*, and the cases on which it relies, illustrates the nature of appellate review that now governs. Most importantly, *Koon* made clear that appellate review was not intended "to vest in appellate courts wide-ranging authority over district court sentencing." 518 U.S. at 97. To the contrary, *Koon* provided that the district court "retains much of its traditional discretion," and its sentencing decisions thus are "due substantial deference." *Id.* at 98.

That is so because "deference [is] owed" to the district court because it is clearly the "'judicial actor * * * better positioned * * * to decide the issue in question.'" *Koon*, 518 U.S. at 99 (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 559-60 (1988)). After all, a district judge is far better able than an appellate court "to make a refined assessment of the many facts bearing" on a sentencing decision, "informed by its vantage point and day-to-day experience in criminal sentencing." *Id.* at 98. Deference thus affords the district court "the necessary flexibility to resolve questions involving 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 404 (1990) (quoting *Pierce*, 487 U.S. at 561-62).

In the wake of *Booker* and *Rita*, appellate courts reviewing sentences for reasonableness must heed these lessons and recognize the institutional disadvantages they face in conducting a searching review of a district judge's fact-bound, discretionary act of selecting an individual sentence. Cf. *Marshall* v. *Lonberger*, 459 U.S. 422, 434 (1983) (quoting *Boyd* v. *Boyd*, 169 N.E. 632, 634 (N.Y. 1930)) ("Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded."). Unless and until Congress directs otherwise, therefore, "'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" *Williams* v. *United States*, 503 U.S. 193, 205 (1992) (quoting *Solem* v. *Helm*, 463 U.S. 277, 290 n.16 (1983)).

To the contrary, *Booker* and *Rita* have restored the principle of "*limited* appellate review of sentencing decisions," a form of review meant to preserve "a court of appeals' traditional deference to a district court's exercise of its sentencing discretion." *Williams*, 503 U.S. at 205 (emphasis added); see also *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 143 (1997) (noting that "deference" is the "hallmark of abuse-of-discretion review" and reversing court of appeals decision that applied an "overly 'stringent' review" to a district court ruling). Such review facilitates the exercise of individualized decision-making and reasoned judgment that, as discussed above, should be the hallmarks of the federal sentencing regime. It allows the district court room to consider the specific circumstances in every case, while minimizing the risk of surrendering to arbitrariness or anarchy. This ensures that the discretion integral to just sen-

tencing remains appropriately bounded by both law and reason.

C. Finally, given the overarching parsimony command of § 3553(a), an appellate court engaged in substantive reasonableness review should ask itself the same fundamental question that Montesquieu, Beccaria, Bentham, and Norval Morris posed: Was the district court reasonable in concluding, or did it fail to ascertain, that the judgment of sentence represents the *least severe* punishment necessary to achieve the specified purposes of the criminal law? That is because "a district court's job is not to impose a 'reasonable' sentence. Rather, a district court's mandate is to impose 'a sentence sufficient, but not greater than necessary, to comply with the purposes'" of sentencing specified in § 3553(a)(2). *United States* v. *Foreman*, 436 F.3d 638, 644 n.1 (6th Cir. 2006); accord *United States v. Kikumura*, 918 F.2d 1084, 1111 (3d Cir. 1990) (Becker, J.) (characterizing the command as a statutory duty to impose a "minimally sufficient" sentence). Just as the procedural mandate that a district court "shall consider" the prescribed sentencing factors must inform the appellate review process, see *Rita*, 127 S. Ct. at 2467-68, so too must the normative mandate that the district court impose a parsimonious sentence. Therefore, if the appellate court is *not* convinced that the district judge reasonably concluded that he or she imposed the least burdensome sanction that would have satisfied the specified purposes of punishment, the unparsimonious sentence should be vacated. In this way, appellate review plays an important role in ensuring that punishment is never imposed wastefully or gratuitously.

* * *

The concept of reasonableness review articulated in *Booker* and *Rita* holds out the prospect of a truly just and humane sentencing process. Respecting the statutory command of parsimony fosters and embodies the importance of respecting the law as written. Requiring courts to consider carefully the various purposes of punishment and to explain their sentences openly and rationally ensures that every case will receive individualized consideration and that sentences will be based on the exercise of reason rather than caprice. And, finally, remembering that punishment requires moral justification, and that it imposes significant costs on individuals that must always be justified, ensures that all people—including criminal defendants—are treated as ends rather than as means.

III. The Eighth Circuit's Special Justification Requirement Is Inconsistent With This Court's Cases And Violates The Sixth Amendment.

When the principles articulated above are applied to this case, it is clear that the Eighth Circuit's approach to appellate review of sentencing decisions is profoundly misguided.

Invoking established circuit precedent, the court of appeals held that, though a sentence outside the guideline range might in some cases be reasonable, such sentences require clear justification "proportional to the extent of the difference between the advisory range and the sentence imposed." *United States* v. *Gall*, 446 F.3d 884, 889 (8th Cir. 2006). This rule means that "the farther the district court

varies from the presumptively reasonable guideline range, the more compelling the justification based on the § 3553(a) factors must be." *Id.* Moreover, an "extraordinary variance" (a term that the court did not define) from the guideline range "must be supported by extraordinary circumstances." *Id.* The court then applied this standard of review to hold that the below-guideline sentence given to Brian Gall "lies outside the limited range of choice dictated by the facts of the case." *Id.*

This reasoning is flawed at every turn. To begin with, there is a significant difference between saying, as this Court did in *Rita*, that a within-guideline sentence imposed by the district court may be presumed reasonable on appeal, and saying, as the Eighth Circuit did here, that a guideline sentence is *the presumptively reasonable sentence.* It is the difference, one integral to the decision in *Rita*, between an appellate presumption and a presumption that binds the sentencing court itself. What *Rita* allowed was the former. Such a presumption, the Court held, has no "independent legal effect," and "simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Rita*, 127 S. Ct. at 2465. In contrast, a requirement that there be special justification "the farther the district court varies from the presumptively reasonable guidelines range," *Gall*, 446 F.3d at 889, erects a presumption that quite plainly *does* have independent legal effect. It establishes the guideline range as presumptively reasonable and directs the district courts to do likewise: to sentence within that range unless special factual cir-

cumstances—present in some, but not all, cases—demand otherwise. That formulation flies in the face of *Rita*'s insistence that "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." *Rita*, 127 S. Ct. at 2465.

What is more, the Eighth Circuit's "extraordinary circumstances" requirement distorts the nature of reasonableness review required by *Rita* and, even worse, reinstates the very sort of binding Guidelines regime held unconstitutional in *Booker*. As this Court's Sixth Amendment cases make clear, a constitutional system of judge-applied guidelines is distinguished by the sentencing court's freedom to impose a sentence outside of the suggested range, and to do so without finding any additional facts. See, *e.g.*, *Cunningham* v. *California*, 127 S. Ct. 856, 870 (2007); *Blakely* v. *Washington*, 542 U.S. 296, 304 (2004). If the judge *must* make some factual finding *before* giving the defendant a greater sentence, the Sixth Amendment is violated. The constitutional violation is the same regardless of whether that requirement is imposed through a direct statutory command to the sentencing court or through the operation of appellate review. See *Rita*, 127 S. Ct. at 2479-80 (Scalia, J., concurring in part and concurring in the judgment). That is why the remedial majority in *Booker*, to save the Guidelines, excised 18 U.S.C. § 3742(e). That provision used appellate review to constrain the ability of district courts to sentence outside of the guideline range and thus brought the Guidelines into conflict with the Sixth Amendment. *Booker*, 543 U.S. at 259 (Breyer, J.).

The Eighth Circuit's Guidelines-centric approach to reasonableness review deprives sentencing courts of the freedom that *Booker* held was constitutionally indispensable. Its approach forbids a district court from imposing an above- or below-guideline sentence unless it first makes factual findings sufficient to demonstrate that such a variance is justified. If that finding is not made, or if the court of appeals deems it insufficient or unjustified, the sentence will be held invalid. Under this rule, the Guidelines are advisory in name only. After all, the mine-run of cases do not, by definition, involve "extraordinary circumstances." In such cases, a sentence significantly above or below the guideline range thus will be legally impermissible.

The fact that out-of-guideline sentences may be imposed in *some* cases no more saves the Eighth Circuit's regime than did the fact that courts before *Booker* could on some occasions depart under § 3553(b) from the otherwise applicable guideline range. Instead, what matters is that variances based on extraordinary circumstances, like departures under the Guidelines, "are not available in every case, and in fact are unavailable in most." *Booker*, 543 U.S. at 234 (Stevens, J.). As such, the "availability of a departure in specified circumstances does not avoid the constitutional issue." *Id.* The Eighth Circuit's rule restores to the federal sentencing system the same constitutional problem identified and cured in *Booker*.

Indeed, the "extraordinary circumstances" standard makes the Guidelines virtually indistinguishable from the unconstitutional sentencing regime struck down in *Blakely*. Under that regime, a judge

could impose a sentence above the "standard range" only if he found "substantial and compelling reasons justifying an exceptional sentence." 542 U.S. at 299; see also *Booker*, 543 U.S. at 234 (Stevens, J.). In most instances, the factual findings that provided compelling reasons for sentencing outside the standard range were not embodied in the jury verdict or guilty plea and thus had to be found by the judge alone. The Court in *Blakely* had little trouble concluding that such a system violated the Sixth Amendment. *Blakely*, 542 U.S. at 304-05.

There simply is no valid constitutional distinction between a rule forbidding significant departures except in "extraordinary circumstances" and a rule forbidding departures except for "substantial and compelling reasons." Under both rules, judicial fact-finding is necessary to supply the legal justification for sentencing above or below a properly calculated guideline range. And, under both rules, there is a significant set of cases in which a non-standard sentence simply is unavailable. Indeed, this very case illustrates that reality. The Eighth Circuit's conclusion that the "extraordinary variance is not supported by extraordinary justifications," had the effect of making Brian Gall's out-of-guideline sentence legally impermissible. *Gall*, 446 F.3d at 889-90. No less than in *Blakely* or *Booker*, therefore, the sentencing regime adopted by the court of appeals here runs contrary to the imperative of the Sixth Amendment.

Finally, the fact that the Eighth Circuit has not laid down a specific set of factual findings that constitute the "extraordinary justifications" necessary to support a "reasonable" out-of-guideline sentence,

Gall, 446 F.3d at 889, is irrelevant. For Sixth Amendment purposes, it does not matter whether the facts found by the sentencing judge in order to justify an enhanced sentence are:

- expressly specified by the legislature (as in *Apprendi* v. *New Jersey*, 530 U.S. 466, 468-69 (2000) (sentence enhanced if judge found that defendant committed the crime "with a purpose to intimidate * * * because of race, color, gender, handicap, religion, sexual orientation or ethnicity"));
- selected by the judge out of a limited and defined range (as in *Ring* v. *Arizona*, 536 U.S. 584, 592-93 (2002) (sentence enhanced if judge found any one of 10 statutory aggravating factors)); or
- selected by the judge in service of making a general and subjective finding (as in *Cunningham*, 127 S. Ct. at 861-62 (sentence enhanced if judge found that there were "circumstances in aggravation" of the crime)).

The upshot of these decisions is clear: "broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of [the Court's] decisions." *Cunningham*, 127 S. Ct. at 869.

Thus, even insofar as the Eighth Circuit's standard purports to give discretion to district courts to select the facts constituting "extraordinary circumstances"—and its stringent review in this case sug-

gests that it does not[3]—that requirement is still constitutionally infirm. It violates the Sixth Amendment because it all but insures that some sentences well above the guideline range will be approved (or rejected) *only* because the district court found (or failed to find) certain facts, not attributable to the jury verdict or guilty plea, that comprised a sufficiently "extraordinary" circumstance. Because the Jury Trial clause thus would forbid the Eighth Circuit's standard from being applied to above-guideline sentences, and because "no one would contend that Congress intended that sentences be reviewed only for being too low," *Rita*, 127 S. Ct. at 2476 (Scalia, J., concurring in part, and concurring in the judgment), the Eighth Circuit's standard has no place in the scheme of "reasonableness" review required by the SRA in light of this Court's cases.

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[3] For example, the Eighth Circuit appears simply to have disagreed with various conclusions of the district court—including the district court's conclusion that Mr. Gall demonstrated post-offense rehabilitation by earning a bachelor's degree and starting his own business—that resulted in the probationary sentence. *Gall*, 446 F.3d at 890. In marked contrast to the court of appeals' opinion, the district court thoroughly addressed Mr. Gall's personal circumstances, the nature of his offense, and other factors underlying its determination that a term of imprisonment would be greater than necessary to meet the specified purposes of punishment. The appellate court thus did little more than substitute its judgment for that of the district court and arrogate to itself the role of sentencer.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States

BRIAN MICHAEL GALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

Whether, when determining the "reasonableness" of a district court sentence under *United States v. Booker*, 543 U.S. 220 (2005), it is appropriate to require district courts to justify a sentence outside the range recommended by the United States Sentencing Guidelines with a finding of extraordinary circumstances.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae include all of the Federal Public and Community Defenders in the United States, other than the two representing the petitioners in this matter and in No. 06-6330, *Kimbrough v. United States*. The National Association of Federal Defenders is a nationwide, non-profit organization whose membership includes Federal Public and Community Defenders and their Assistants. Federal Public and Community Defenders have offices in 88 of the 94 federal judicial districts and represent tens of thousands of individuals sentenced in federal court each year. The issue presented in this case is of great importance to our work and the welfare of our clients.

SUMMARY OF ARGUMENT

This Court should reject the extraordinary circumstances test and make clear that, whether the sentence is inside or outside the advisory guideline range, the court of appeals must defer to the sentencing court's assessment of the facts and its judgment as to the appropriate sentence under § 3553(a). If district court judges are permitted to sentence according to the now-governing sentencing law, 18 U.S.C. § 3553(a), with required appellate deference to their sentencing judgments, they can, for the first time, impose sentences that are sufficient, but not greater than necessary, to satisfy sentencing purposes, in light of all relevant statutory factors; provide vital feedback to the Commission which it can use to improve its policies; and

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[1] The parties have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored any part of this brief. Sup. Ct. R. 37.6. No person or entity other than *Amici Curiae* made a monetary contribution to the preparation or submission of the brief.

develop a common law of sentencing that is useful and informative to other courts, litigants, and the Commission.

The concept of sentencing reform, as envisioned by early reformers, adopted by Congress, and advocated by the first Sentencing Commission, was of a partnership in which the district courts, particularly through reasoned judgments in sentencing outside the guideline range, would play a pivotal role. The courts of appeals would affirm reasonable departures and synthesize the district courts' reasons, the Commission would learn, and the Guidelines would evolve. This concept was never realized for a number of reasons. The mandatory nature of the Guidelines, their restrictions on individualized sentences, and close appellate scrutiny essentially forbade district courts to consider, and thus they rarely discussed, whether the Guidelines accomplished sentencing purposes, avoided unwarranted disparities, or appropriately took account of individual circumstances. This inhibited the development of a common law of sentencing and the contemplated dialogue between the courts and the Commission.

Following *Booker*, the possibility again arose that the system would reflect and respond to the reasoned judgments of sentencing courts. Since then, however, a majority of the courts of appeals has adopted the extraordinary circumstances test to justify sentences outside the guideline range, which, as before *Booker*, asks whether the sentence is reasonable with regard to the Guidelines, prohibits critical evaluation of Commission policies, and permits courts of appeals to substitute their own judgments for those of the district courts. This method of review again stifles an exchange between the courts and the Commission, bears no resemblance itself to a sentencing common law, discourages the district courts from developing their own sentencing common law, and is now unlawful and unconstitutional.

This Court should now make clear that, whether the sentence is inside or outside the advisory guideline range, the court of appeals must defer to the sentencing court's assessment of the facts and its judgment as to the appropriate sentence under § 3553(a). The district courts are best situated to ensure that the goals of sentencing are met in individual cases, to develop a common law of sentencing, and to provide the Commission with the information it needs to improve its generally applicable advice.

ARGUMENT

I. The Original Intent Was That Sentencing Policy and Practice Would Evolve in Response to the Actions and Views of Sentencing Courts.

One of the chief principles espoused by those who sought to reform sentencing in the 1970s and 1980s was that the courts would adopt a reasoned approach to sentencing, and their work, set forth in reasons for sentences and sentencing opinions, would inform other courts and potentially be incorporated into sentencing guidelines. In the Sentencing Reform Act (SRA), Congress adopted this principle in a number of provisions, and it was embraced by the first Sentencing Commission.

Before the SRA, district court judges were not required to state reasons for their sentencing decisions, and there were virtually no sentencing opinions by district court judges or appellate courts. From the beginning of the movement for a rationalization of sentencing, it was the hope of Marvin Frankel, Norval Morris and other early reformers that judges would state reasons for their sentences and that appellate courts would synthesize those reasons into a consistent body of sentencing jurisprudence. *See* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State*

Experiences, 91 Nw. L. Rev. 1441, 1444-46, 1448 (1997). In this way:

> The courts would have the responsibility . . . for developing a jurisprudential approach to those occasions in which it is appropriate to set guideline presumptions aside. The commission, for its part, would benefit from the ongoing elaboration of such a common law of sentencing. Over time, the substantive principles developed by judges would coexist with, or even be incorporated into, the guidelines themselves.

Id. at 1455.

Congress embraced this principle in several provisions of the SRA. District courts would state their reasons, 18 U.S.C. § 3553(c), the Commission would collect, study and disseminate those reasons, 28 U.S.C. §§ 994(w), 995(a)(15), and appellate courts would uphold "reasonable" departures, having regard for the sentencing court's reasons and the factors set forth in § 3553(a). 18 U.S.C. § 3742(e) (1990). Congress thought that appellate courts would:

> provide case law development of the appropriate reasons for sentencing outside the guidelines. . . . For example, if the courts found that a particular offense or offender characteristic that was not considered, or not adequately reflected, in formulation of the guidelines was an appropriate reason for imposing sentences that differed from those recommended in the guidelines, the Sentencing Commission might wish to amend the guidelines to reflect the factor.

S. Rep. No. 98-225, at 151 (1983).

The original Commission also contemplated that the district courts would provide the feedback through which the Guidelines, which did not resolve every issue at the outset, would evolve. It viewed the initial set of guidelines as "but the first step in an evolutionary process," which

would result from "continuing research, experience and analysis." U.S.S.G. § 1A1.1, pt. A, ¶ 3. Later Commissions could "write and re-write guidelines, with progressive changes," by "monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so." *Id.*, ¶ 4(b). As explained by then-Chief Judge Breyer, "the very theory of the guidelines system is that when courts, drawing upon experience and informed judgment in cases, decide to depart, they will explain their departures," the "courts of appeals and the Sentencing Commission, will examine, and learn from, those reasons," and "the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves." *United States v. Rivera*, 994 F.2d 942, 949-50 (1st Cir. 1993). Appellate courts would presumably write opinions placing cases "within a broader perspective of sentencing law." *Id.* at 950.

Thus, from the beginning, one foundation of the reformed system was that appellate courts would synthesize sentencing judges' substantive reasoning into a common law of sentencing, and that this would coexist with, and potentially be incorporated into, the Guidelines. Reitz, *supra*, at 1455.

II. Before *Booker*, The Intent That Decisions of Sentencing Judges Would Contribute to a Sentencing Common Law and Evolution of the Sentencing Guidelines Was Not Fulfilled.

Due to the mandatory nature of the Guidelines, policies adopted by the Commission, and close appellate review enforcing the Guidelines, a common law of sentencing did not develop, and productive dialogue between the courts and the Commission was largely missing.

Though judges were always nominally directed to impose sentences in compliance with § 3553(a), at the same time, they were required to impose the guideline

sentence, whether or not it complied with § 3553(a), unless the facts happened to fit a departure as defined and approved by the Commission, or there was a circumstance not adequately considered by the Commission in formulating its guidelines, policy statements or official commentary. 18 U.S.C. § 3553(b)(1) (2004).

Further reducing the possibility of the courts influencing the development of the Guidelines, the Commission severely narrowed the district courts' discretion to consider the adequacy of the Guidelines. The Commission classified as never or not ordinarily relevant all history and characteristics of the offender other than criminal history, and either did not mention, narrowly defined, or limited the impact of mitigating circumstances of the offense. *See* U.S.S.G. Ch. 5, pts. H, K. p.s.; U.S.S.G. § 3B1.2. Even though the Guidelines could not possibly take into account all factors that are relevant to individual sentencing decisions,[2] the Commission nevertheless placed a wide range of mitigating factors off limits, a decision that was both contrary to congressional intent and unexplained.[3] This decision effectively pre-empted the courts' ability to consider what factors might properly constitute grounds for mitigation of sentence.

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[2] U.S.S.G. § 1A1.1, pt. A ¶ 4(b); U.S. Sentencing Comm'n, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 3-4 (Oct. 2003).

[3] The Commission was directed to consider the relevance of a variety of offender characteristics, 28 U.S.C. § 994(d), and to reflect the "general inappropriateness of considering" education, vocational skills, employment record, family ties and community ties "in recommending a term of imprisonment or length of a term of imprisonment." 28 U.S.C. § 994(e). Congress explained that the purpose of § 994(e) was "to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties," but "each of these factors," in § 994(d) and (e), "may play other roles in the sentencing decision." S. Rep. No. 98-225, at 175 (1983).

Further, the "statutory injunction to uphold 'reasonable' departure sentences . . . receded far into the distance." Reitz, *supra*, at 1468. When judges imposed sentences outside the guideline range for reasons not explicitly encouraged in the Guidelines' policy statements, including the failure of a particular guideline to satisfy sentencing purposes, the courts of appeals quickly reined them in. *See, e.g., United States v. Tucker*, 386 F.3d 273, 277 (D.C. Cir. 2004) ("To the extent the district court based the departure on its belief that the sentence was unjust, it relied on a factor that is clearly impermissible under the Guidelines."); *In re Sealed Case*, 292 F.3d 913, 916 (D.C. Cir. 2002) ("Disproportionality does not, in itself, provide an appropriate basis for a downward departure."); *United States v. Goff*, 20 F.3d 918, 922 (8th Cir. 1994) (Heaney, J., dissenting) (by rejecting district court's reliance on defendant's family ties and responsibilities, majority "pull[s] another plank from beneath district judges, mandating that they swim in the sea of the guidelines, instructing them that any attempt to reach higher ground and exercise their informed judgment about the facts of a defendant's life will be frustrated by this court.").[4]

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[4] Appellate courts commonly trumped the judgments of the district courts through "spectacles of dueling discretion," in which "the circuit court often recognized that the 'kinds' of factors cited by the sentencing court were supportive of departure, but decided that their 'degree' was not," and "applied their own instincts as to the placement of the case on a continuum." Reitz, *supra*, at 1467-68; *see also* Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 Yale L.J. 2043, 2048, 2050-51 (1992) ("Both the Commission and the courts of appeals should be responding more positively to the pressures from trial judges to increase their authority to mitigate."); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 25-26, 78-84 (2003) (hereinafter "*Reason Behind the Rules*") ("Departure in cases where the Guidelines result in disproportionate punishment, or inadequate or excessive incapacitation, provides

(Continued on following page)

Thus, the efforts of sentencing courts to provide feedback to the Commission about which guidelines were in need of revision were thwarted, and their views had no discernible impact on the Commission's policy choices.[5] By all accounts, including that of the Commission, the ideal model of policy development envisioned in the SRA was never fully implemented, and the goals of sentencing reform have been, at best, partially achieved. *See* U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 142-46 (2004); Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker, 38 Ariz. St. L.J. 425, 450 (2006) (hereinafter "*Immediate and Long-Term Effects*"); Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis,* 105 Colum. L. Rev. 1315 (2005); Linda Drazga Maxfield, U.S. Sentencing Comm'n, *Final Report: Survey of Article III Judges on the Federal Sentencing Guidelines* ES2-7 (Mar. 2003).

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feedback to the Commission about which guidelines are most in need of revision [but] many appellate courts have opted to enforce [the Guidelines] more rigidly than anyone predicted or than the relevant statutes appear to require.").

[5] The Commission mentioned appellate decisions reviewing departures in only five of nearly 700 amendments. *See* U.S.S.G., App. C, amends. 602 (forbidding post-sentencing rehabilitation), 582 (narrowing diminished capacity), 603 (narrowing aberrant behavior), 604 (permitting departure based on conduct that was dismissed or not charged as part of a plea agreement), 645 (permitting departure based on discharged term of imprisonment).

III. After *Booker*, Aggressive Appellate Review of Sentences Outside the Guideline Range Again Forecloses the Possibility of District Court Feedback to the Commission, Discourages Development of a Sentencing Common Law, and Is Now Unlawful and Unconstitutional.

With this Court's decision in *Booker*, the possibility arose that the district courts, which now for the first time were unambiguously required to impose sentences sufficient, but no greater than necessary, to satisfy sentencing purposes in light of all relevant circumstances, would be able to engage in critical evaluation of the Guidelines and that this might lead to their improvement.[6] This potential is being nipped in the bud, however, by an aggressive form of review that is indistinguishable from the *de novo* standard excised by *Booker*.

This method of review asks not whether the sentence is reasonable with respect to § 3553(a), *Booker*, 543 U.S. at 261, but whether it is reasonable with respect to the

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[6] *See* Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 Stan. L. Rev. 217, 230 (2005) (noting historical inability of district courts to critically evaluate guidelines, but after *Booker*, "review conducted by individual judges as they consider the particular cases before them . . . could produce, as others have advocated in the past, a 'common law' of sentencing"); Judge Nancy Gertner, *Thoughts on Reasonableness*, 19 Fed. Sent. Rep. 165, 2007 WL 1296012, *5 (2007) (Guidelines should be "critically evaluated in each case . . . for their fealty or lack of fealty to the purposes of sentencing [with] the reasons carefully spelled out."); Douglas A. Berman, *Tweaking* Booker: *Advisory Guidelines in the Federal System*, 43 Hous. L. Rev. 341, 375 (2006) (*Booker*'s "remedial opinion, by emphasizing the provisions of § 3553(a) and essentially demanding a sentencing process focused on the exercise of reasoned judgment by federal judges . . . creat[es] the possibility of developing a purpose-driven 'common law of sentencing' . . . which means that judges now can and must give more sustained attention to the broader goals of sentencing reform.").

Guidelines, and defers not to the record findings of sentencing judges, *Rita v. United States*, 127 S. Ct. 2456, 2463 (2007), but to the assumed findings of the Commission. This intrusive standard impedes the Commission's ability to learn from the district courts' experience, *United States v. Wright*, 873 F.2d 437, 444 (1st Cir. 1989), and discourages the development of a useful, healthy and transparent common law. *United States v. Williams*, 481 F. Supp. 2d 1298, 1301-02 (M.D. Fla. 2007).

In those circuits applying the extraordinary circumstances test, appellate courts have simultaneously required virtually no explanation for within-guideline sentences and rejected even the most detailed justifications for non-guideline sentences, thereby "discouraging the development of individualized, policy-driven sentences where the facts so warrant," Adam Lamparello, *The Unreasonableness of "Reasonableness" Review: Assessing Appellate Sentencing Jurisprudence after* Booker, 18 Fed. Sent. Rep. 174, 2007 WL 1895180, *5 (2006), just as before *Booker*. Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: the Opportunity and Need for Judicial Lawmaking*, 11 Stan. L. & Pol'y Rev. 93, 105 (1999) ("Appellate judges have principally sought to ensure compliance with the Commission's guideline determinations.").

Just as the mandatory nature of the Guidelines before *Booker* hindered judicial evaluation of the substance of the Guidelines, the extraordinary circumstances test does the same. As one district court judge observed, it "sounds very much like the old departure standard" and "improperly elevates the guidelines above the other factors set forth in section 3553(a)." *United States v. Cull*, 446 F. Supp. 2d 961 (E.D. Wis. 2006). Indeed, the decisions of courts of appeals under this standard are fundamentally indistinguishable from the pre-*Booker* regime, for they routinely reverse on the ground that the district judge's reason is discouraged,

prohibited or not recognized by Commission policy and is therefore absolutely not permitted or is not sufficiently "extraordinary" to overcome that obstacle. *See, e.g., United States v. Richardson*, No. 05-4817, 2007 WL 1413075, *2 (4th Cir. May 11, 2007) (defendant's prior good character, lack of criminal record and influence of relationship with principal conspirator were "not so extraordinary as to support" non-guideline sentence, and reliance on factors Commission deemed "not ordinarily relevant" (youth) or "not appropriate" (post-sentence rehabilitation) was "misplaced"); *United States v. Borho*, 485 F.3d 904, 912-13 (6th Cir. 2007) (district court must offer "compelling justification" if factors discouraged by guidelines form basis of "substantial variance" from guideline range); *United States v. Funk*, 477 F.3d 421, 427-31 (6th Cir. 2007) (disagreement with career offender guideline as applied to nature and circumstances of defendant and offense is "an impermissible sentencing factor"); *United States v. Simmons*, 470 F.3d 1115, 1130-31 (5th Cir. 2006) (court must "explain why the prohibited or discouraged factor, as it relates to defendant, is so extraordinary that the policy statement should *not* apply.") (emphasis in original); *United States v. Repking*, 467 F.3d 1091, 1095-96 (7th Cir. 2006) ("we do not share the district court's view that [defendant's] charitable works were so extraordinary that they should be given weight despite the contrary view of the Sentencing Commission"); *United States v. Wallace*, 458 F.3d 606, 611 (7th Cir. 2006) (judge's stated belief "that culpability should be measured by actual loss . . . was not an appropriate consideration, as the guidelines have already made the judgment that intended loss is what counts"); *United States v. Ture*, 450 F.3d 352, 358-59 (8th Cir. 2006) (reversing sentence to probation, in part, because "[t]he Court's logic does not convince us that [defendant's] age and health are so extraordinary that they eliminate the need for imprisonment"). Further, in

applying this standard, the courts of appeals substitute their own judgments for those of the district courts as to findings of fact, *United States v. Davis*, 458 F.3d 491, 502 (6th Cir. 2006) (Keith, J., dissenting), the weight to be given the facts, *United States v. Cage*, 451 F.3d 585, 595 (10th Cir. 2006), and the appropriate sentence. *United States v. Thurston*, 456 F.3d 211, 220 (1st Cir. 2006). This has rendered illusory the discretion of district courts to apply the standards of § 3553(a) to the cases before them, has stymied judicial evaluation of whether the Guidelines are consistent with § 3553(a) in operation, and defeats any serious possibility that sentencing principles developed by district courts might ultimately be recognized in the Guidelines.

By forbidding district courts to disagree with any Commission policies, a majority of the courts of appeals would end, before it has begun, the discussion whether those policies further the goals of § 3553(a). *See* Carissa Byrne Hessick & Andrew Hessick, Rita, Claiborne, *and the Courts of Appeals' Attachment to the Sentencing Guidelines*, 19 Fed. Sent. Rep. 171, 2007 WL 1296013, *5 (2007) (discussing appellate courts' "insistence that sentences not be based on a sentencing court's disagreement with policy decisions of the Guidelines or on facts that might affect sentences of more than a small number of defendants"); *United States v. Pruitt*, 487 F.3d 1298, 1314-15 & n.3, 1317-18 (10th Cir. 2007) (McConnell, J., concurring) (explaining that appellate courts' role is not to ensure that the guidelines reflect good policy, but to affirm guideline sentences even when the policy reflected therein is "misguided," and to reverse district courts' stated disagreements with admittedly "misguided" Commission policies, because Congress entrusted policy questions to the Commission). In short, as before *Booker*, the appellate courts have created a "veto over trial court innovations" that leaves little room for district court discretion or "the

human element of sentencing decisions," "chok[ing] off" the very jurisprudence Congress and the first Commission expected would enable the system to evolve. *See* Reitz, *supra*, at 1455, 1458, 1471; *see also Rita*, 127 S. Ct. at 2469; *id.* at 2482-83 (Scalia, J., concurring).

Moreover, this position effectively restores mandatory Guidelines and the accompanying Sixth Amendment violation. It forbids a judge to increase, or decrease, a sentence unless the judge finds facts not found by a jury or admitted by the defendant. *Rita*, 127 S. Ct. at 2466. It does not allow a non-guideline sentence based on a conclusion that the guideline sentence, as a matter of policy, fails to reflect § 3553(a) considerations or reflects an unsound judgment, or that a different sentence is appropriate "regardless." *Id.* at 2465, 2468; *see also Cunningham v. California*, 127 S. Ct. 856, 862-70 (2007) (sentencing system that does not permit sentencing increase based on "general objectives of sentencing" alone without a "fact-finding anchor" violates the Sixth Amendment). As the government has conceded, to avoid the Sixth Amendment violation, judges must be free to disagree with the guidelines, even when the case is typical,[7] that is, in the absence of extraordinary facts.

A statistical comparison illustrates that limiting district court discretion to sentence outside the guideline range, absent extraordinary circumstances, effectively restores mandatory Guidelines and recreates the Sixth Amendment violation. In circuits that do not use the extraordinary circumstances test (District of Columbia, Second, Third, and Ninth circuits), non-guideline sentences were reversed as unreasonable in only 5.9% of

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[7] Transcript of Oral Argument at 32-33, *Claiborne v. United States*, No. 06-5618 (U.S. argued Feb. 20, 2007); Transcript of Oral Argument at 50, *Rita v. United States*, No. 06-5754 (U.S. argued Feb. 20, 2007).

cases. Appeals courts employing the extraordinary circumstances test (First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh circuits), reversed three times more often, holding 18.8% of non-guideline sentences unreasonable. The Eighth Circuit, which reversed Mr. Gall's sentence, reversed non-guideline sentences 35.1% of the time.[8]

The impact of the extraordinary circumstances test on sentences imposed by district court judges is apparent. According to recent Commission statistics, the rate of non-guideline sentences imposed by judges in extraordinary circumstances circuits is 34.9% less than in non-extraordinary circumstances circuits,[9] demonstrating the "substantial gravitational pull" that "in practical terms preserve[s] the very feature of the Guidelines that threatened to trivialize the jury right." *Rita*, 127 S. Ct. at 2487 (Souter, J., dissenting); *see also id.* at 2473 (Stevens, J., concurring); *id.* at 2478 n.3 (Scalia, J., concurring).

In short, the requirement that there be extraordinary circumstances to permit a sentence outside a guideline range and that such a sentence may not be based upon disagreement with Commission policy forecloses the

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[8] *See* Appendix. These statistics were compiled from the data contained in the Court of Appeals Review, filed as an Appendix to the Brief *Amici Curiae* of the Federal Public and Community Defenders and the National Association of Federal Defenders in Support of Petitioners, *Rita v. United States*, Case No. 06-5618 and *Claiborne v. United States*, Case No. 06-5754 (Dec. 18, 2006).

[9] Of the 23,212 sentences imposed in extraordinary circumstances circuits, 2,847, or 12.3%, were outside the guideline range (not including government-sponsored below-guideline sentences). Of the 9,355 sentences imposed in non-extraordinary circumstances circuits, 1,553, or 16.6%, were outside the guideline range (not including government-sponsored below-guideline sentences). *See* U.S. Sentencing Comm'n, *Preliminary Quarterly Data Report*, 2d Quarter Release, Through March 31, 2007, Table 2.

possibility of feedback by district courts to the Commission, discourages development of a sentencing common law, and is both unlawful and unconstitutional under *Booker* and *Rita*.

IV. Requiring Deference to District Courts' Application of § 3553(a) to Individual Cases Will At Last Permit the Development of a Sentencing Common Law and a Dialogue with the Commission.

The essential component of a system that *can* produce sentences that meet the purposes of sentencing, avoid unwarranted disparities, and take account of individual circumstances, and that *can* evolve over time, is the ability of district court judges to impose non-guideline sentences within the framework of § 3553(a), to explain those sentences, and to have their judgments respected.

District court judges can fulfill this uniquely vital role now that they are no longer required, or permitted, to defer to the Commission's policy judgments, *Rita*, 127 S. Ct. at 2465, and appellate courts may no longer "grant greater factfinding leeway to [the Commission] than to a district judge." *Id.* at 2463. After an independent evaluation, the judge may conclude that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations," "the Guidelines reflect an unsound judgment, or . . . do not generally treat certain defendant characteristics in the proper way," or "the case warrants a different sentence regardless." *Id.* at 2465, 2468. In explaining why, the judge can provide valuable information to the Commission, other judges, and also importantly to the defendant. *See Immediate and Long-Term Effects*, *supra*, at 464 ("Many sentencing judges engage in thoughtful consideration of the Commission's guidelines and policy statements, as well as the statutory factors found at 18 U.S.C. § 3553(a), and

issue illuminating sentencing opinions. . . . A detailed statement of reasons or written sentencing opinion can provide valuable feedback to the Commission and explain to the appellate courts how the guidelines failed in a particular case.").

When an appellate court "substitute[s] its judgment for that of the sentencing court as to the appropriateness of a particular sentence," *Williams v. United States*, 503 U.S. 193, 205 (1992) (internal citation and quotation marks omitted), it is inherently less reliable and less informative than the district court decision reviewed, and thus less helpful to the Commission. *See Koon v. United States*, 518 U.S. 81, 98-99 (1996) ("'To ignore the district court's special competence . . . risk[s] depriving the Sentencing Commission of an important source of information, namely, the reactions of the trial judge to the fact-specific circumstances of the case.'") (quoting *Rivera*, 994 F.2d at 951). And, because sentencing involves consideration of "unique factors that are little susceptible of useful generalization," *Koon*, 518 U.S. at 99, appellate court decisions are of marginal utility to other courts. *Buford v. United States*, 532 U.S. 59, 65-66 (2001) (fact-bound nature of determination "limits the value of the appellate court precedent, which may provide only minimal help when other courts consider other . . . circumstances").

The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts, and gains insights not conveyed by the record. *Rita*, 127 S. Ct. at 2471-72 (Stevens, J., concurring); *Pierce v. Underwood*, 487 U.S. 552, 560 (1988). "The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court." *Rita*, 127 S. Ct. at 2469. "District courts have an institutional advantage over

appellate courts [because they] must make a refined assessment of the many facts bearing on the outcome, informed by [their] vantage point and day-to-day experience in federal sentencing." *Koon*, 518 U.S. at 98. *Accord Pruitt*, 487 F.3d at 1318 (McConnell, J., concurring) (role of appellate courts "cannot be to ensure that the sentence is properly calibrated to the particular circumstances of the offender and the offense. District judges, who interact with the defendant and hear the evidence in the case, are far better situated than appellate judges to make these judgments.").

District court judges are better-situated than appellate courts to determine whether "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations," or whether "the Guidelines reflect an unsound judgment." *Rita*, 127 S. Ct. at 2465, 2468. This too is a fact-bound determination within the special competence and experience of the district courts. It requires the finding and weighing of facts particular to the offense and the offender, and broader purpose-related facts as well, such as the statistical likelihood of recidivism of persons of the defendant's age, educational level and work history, the deterrent value and societal cost of lengthy prison sentences for the type of offense, the community's view of the seriousness of the offense,[10] the efficacy of substance abuse or other mental health treatment. *See, e.g., United States v. Brennan*, 468 F. Supp. 2d 400, 404-08 (E.D.N.Y. 2007); *United States v. Holden*, No. 06-20345, 2007 WL 1712754 (E.D. Mich. June 13, 2007); *United States v. Nellum*, Crim. No. 2:04-30, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005); *United States v. Perella*, 273 F. Supp. 2d 162 (D. Mass. 2003). The question is not amenable to "the normal law-clarifying benefits that come from an appellate decision on

[10] 28 U.S.C. § 994(c)(4), (5).

a question of law," as the answer depends on a "diffuseness of circumstances." *Pierce*, 487 U.S. at 561-62. Further, district courts can better identify persistent problems with the Guidelines, *see, e.g., United States v. Ibanga*, 454 F. Supp. 2d 532 (E.D. Va. 2006) (relevant conduct rules as applied to acquitted conduct "run[] afoul of the statutory sentencing factors set forth in 18 U.S.C. § 3553(a)"); *United States v. Saenz*, 429 F. Supp. 2d 1081 (N.D. Iowa 2006) (describing massive disparities routinely arising from U.S.S.G. § 5K1.1), because they see so many more cases than appellate courts do. *Koon*, 518 U.S. at 98; U.S. Sentencing Comm'n, *2006 Sourcebook of Federal Sentencing Statistics*, Tables 2 and 55 (88.6% of sentences imposed by district courts were not appealed).

Judges can make findings based on expert testimony and reports, criminological research, health and sociological studies. They are no longer confined to consulting only the guidelines, policy statements and official commentary of the Commission to determine whether a circumstance was "adequately taken into consideration" such that a departure is warranted, 18 U.S.C. § 3553(b)(1) (2004), but must conduct their *own* assessments in discharging their statutory duties under § 3553(a). *See also* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").[11] As trial judges whose daily

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[11] *Williams v. New York*, 337 U.S. 241, 246 (1949) ("Both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.").

function is to hear and evaluate evidence, they are well-positioned to consult pertinent research and studies and to assess the validity and relevance of such studies in light of the facts of the case and their extensive sentencing experience.

The Commission itself has conducted studies that have not been incorporated into the Guidelines but upon which judges can and should rely. In addition to the reports on crack cocaine sentencing,[12] the Commission's *Fifteen Year Report* identifies serious problems with the career offender guideline, the relevant conduct rules, the drug guidelines generally, and various forms of disparity that have increased under the Guidelines, most notably racial disparity and hidden disparities caused by the government's practices as permitted and encouraged by the Guidelines.[13] It has published three reports on recidivism, acknowledging that the criminal history rules were never based on empirical evidence and identifying numerous factors that predict reduced recidivism which are not included in the Guidelines and factors that do not predict recidivism which are included in the Guidelines.[14] While

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[12] With one possible exception, *United States v. Pickett*, 475 F.3d 1347 (D.C. Cir. 2007) (district court erred in neglecting to consider Commission's findings), the courts of appeals have restricted the ability of district courts to rely on the Commission's findings in its crack cocaine reports. *United States v. Willis*, 479 F. Supp. 2d 927, 933-35 (E.D. Wis. 2007) (discussing appellate case law regarding use of Commission's crack reports and their impact on sentencing under § 3553(a)).

[13] U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 47-55, 76, 82, 91, 94, 102-06, 111-15, 117, 122, 131-35, 140-42 (2004).

[14] U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) (hereinafter "*Measuring Recidivism*"); U.S. Sentencing Comm'n, *Recidivism and the First Offender* (May 2004); U.S. Sentencing

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the rules remain unchanged, judges can and should rely on these extra-guideline findings to impose non-guideline sentences that better comply with § 3553(a).[15]

There are many areas, highly relevant to sentencing purposes, in which the Commission has not collected or conducted research, but in which significant research is available from other sources. Examples include studies on brain development by the National Institutes of Health and others, as cited by the district court in this case,[16] research showing the efficacy and cost savings of drug treatment, education and job training over lengthy

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Comm'n, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 2005).

[15] *See United States v. Fernandez*, 436 F. Supp. 2d 983 (E.D. Wis. 2006) (relying on *Fifteen Year Report*'s discussion of career offender guideline to impose non-guideline sentence); *United States v. Germosen*, 473 F. Supp. 2d 221 (D. Mass. 2007) (relying on *Fifteen Year Report* to point out disparities arising from government's unilateral power to reward cooperation, contrasting restrictions on aberrant conduct guideline with recidivism reports); *United States v. Martinez*, Crim. No. 99-40072, 2007 WL 593629 (D. Kan. Feb. 21, 2007) (notifying counsel considering non-guideline sentence based, in part, on defendant's age, referencing recidivism reports showing increased age and first offender status show decreased likelihood of recidivism); *United States v. Ruiz*, Crim. No. 04-1146-03, 2006 WL 1311982 (S.D.N.Y. May 10, 2006) (noting several courts have imposed non-guideline sentences for defendants over 40 based on markedly reduced recidivism, citing recidivism study); *United States v. Ali*, Crim. No. 1:05-5, 2006 WL 1102835 (E.D. Va. Apr. 17, 2006) (imposing non-guideline sentence, citing recidivism reports).

[16] Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Science 105-09 (June 2004) (reporting results of longitudinal study for the National Institutes on Health on brain development in adolescents); Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, Wash. Post, Feb. 1, 2005 at A01 (study shows "that the region of the brain that inhibits risky behavior is not fully formed until age 25").

incarceration in reducing crime,[17] reports from the Department of Justice and others showing that lengthy prison terms are being served by too many offenders with little risk of recidivism and without deterrent value,[18] research on the adverse impact of incarceration on children and families,[19] analyses of the suitability of members

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[17] Susan L. Ettner et al., *Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment "Pay for Itself?"*, 41 Health Services Res. 192-213 (2006) (for every $1 spent on drug treatment, $7 is saved in general social savings, primarily in reduced offending and also in medical care); Stephen J. Morse, *Addiction, Genetics and Criminal Responsibility*, 69 Law & Contemp. Probs. 165, 205 (2006) ("The criminal justice system response should be limited and reformed to enhance the potential efficacy of treatment approaches."); Don Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime*, Vera Institute of Justice, January 2007 (discussing diminishing returns of increased incarceration on crime rate and cost effectiveness of investment in education and employment).

[18] U.S. Dep't of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (Feb. 1994), *available at* http://www.fd.org/pdf_lib/1994%20DoJ%20study%20part%201.pdf; The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005), *available at* http://www.sentencingproject.org/pdfs/incarceration-crime.pdf; Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 Fed. Sent. Rep. 12, 1999 WL 1458615 (1999); Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22, 1994 WL 502677 (1994).

[19] Ross D. Parke & K. Alison Clarke-Stewart, *From Prison to Home: Effects of Parental Incarceration on Young Children* (Dec. 2001), presented at U.S. Dep't of Health and Human Services National Policy Conference, "From Prison to Home: The Effect of Incarceration and Reentry on Children, Families and Communities" (2002) (discussing impact of parental incarceration on children and benefits of alternatives to incarceration); U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Risk Factors for Delinquency: An Overview* (2001) (discussing link between aggression, drug abuse, and delinquency in children to several factors, including separation from parents); The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7 (2005) ("The persistent removal of persons from the community to prison and their eventual return has a destabilizing

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of immigrant populations for intermediate sanctions,[20] reports on the efficacy of victim mediation as an alternative to incarceration,[21] and studies demonstrating that contrary to myth, recidivism rates for sex offenders are lower than in the general criminal population, and that community treatment for sex offenders is effective.[22]

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effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality."); Patricia M. Wald, "*What About the Kids?*": *Parenting Issues in Sentencing*, 8 Fed. Sent. Rep. 137, 1995 WL 862004 (1995) (discussing growing body of research showing that children fare better in their parents' care than in foster care or elsewhere).

[20] Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 338, 353 (2005).

[21] Nancy Lucas, *Restitution, Rehabilitation, Prevention, and Transformation: Victim-Offender Mediation for First-Time Non-Violent Youthful Offenders*, 29 Hofstra L. Rev. 1365 (2001) (explaining ancient concept of "restorative justice" as alternative to incarceration, citing numerous studies examining its effectiveness in criminal context); *see also, e.g.*, James Bonta et al., *Restorative Justice: An Evaluation of the Restorative Resolutions Project*, Report No. 1998-05, Solicitor General of Canada (Oct. 1998) (collecting studies regarding restorative justice and reporting that offenders participating in victim and community reconciliation program rather than being incarcerated were more likely to make restitution to victims and generally had significantly lower recidivism rates), *available at* http://ww2.ps-sp.gc.ca/publications/corrections/pdf/199810b_e.pdf.

[22] U.S. Dep't of Justice, Bureau of Justice Statistics, Office of Justice Programs, *Recidivism of Sex Offenders Released from Prison in 1994* (Nov. 2003) (finding sex offenders had lower overall rearrest rate compared to non-sex offenders and no clear association between length of incarceration and recidivism rates); U.S. Dep't of Justice, Center for Sex Offender Management, Office of Justice Programs, *Myths and Facts About Sex Offenders* (Aug. 2000) (discussing recidivism rates and finding that treatment costs far less than incarceration); F.S. Berlin, *A Five-Year Plus Follow-up Survey of Criminal Recidivism Within a Treated Cohort of 406 Pedophiles, 111 Exhibitionists and 109 Sexual Aggressives: Issues and Outcomes*, 12 Am. J. of Forensic Psych. 3 (1991) (documenting effectiveness of community treatment for sex offenders).

Thus, district judges can inform the Commission of issues it has not identified, help it to understand issues it has not resolved, and alert it to issues it may have thought were closed. For example, after *Booker*, district courts have informed the Commission that the career offender guideline (from which the Guidelines permit a departure of only one level) fails to distinguish between serious and non-serious offenses by substantially reducing career offender sentences in many cases.[23] In *United States v. Ennis*, 468 F. Supp. 2d 228, 234 & n.11 (D. Mass. 2006), the judge pointed out that the definition of career offender predicates covers misdemeanor convictions, contrary to 28 U.S.C. § 994(h), from states with misdemeanors punishable by more than one year. In *United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007), the judge identified a "structural problem" in the relevant conduct rule as shown by two different probation officers "calculating" ranges of 37-46 months and 151-188 months for two identically-situated defendants in the same case. In *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006), the judge explained how calculations under the fraud guideline based on unintended loss and various overlapping adjustments resulted in a "patently absurd" life sentence. *United States v. Gener*, Crim. No. 04-424-17, 2005 WL 2838984

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[23] *See* U.S. Sentencing Comm'n, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* 137-40 (Mar. 2006); *see, e.g., United States v. Person*, 377 F. Supp. 2d 308 (D. Mass. 2005); *United States v. Hubbard*, 369 F. Supp. 2d 146, 148 (D. Mass. 2005); *United States v. Naylor*, 359 F. Supp. 2d 521 (W.D. Va. 2005); *United States v. Serrano*, Crim. No. 04-424, 2005 WL 1214314, at **7-9 (S.D.N.Y. May 19, 2005); *United States v. Carvajal*, Crim. No. 04-222, 2005 WL 476125, **5-6 (S.D.N.Y. Feb. 22, 2005). *But see United States v. Moreland*, 366 F. Supp. 2d 416 (S.D. W. Va. 2005) (reducing 360-month career offender sentence to 120 months under § 3553(a)), *rev'd*, 437 F.3d 424 (4th Cir. 2006) (vacating and remanding for imposition of sentence of no less than 240 months under extraordinary circumstances test).

*5 (S.D.N.Y. Oct. 26, 2005) illustrated the problem with including juvenile adjudications with a sentence of 60 days or more in the criminal history score where the juvenile offense is trivial and the length of confinement results not from the gravity of the offense but family circumstances and special needs. This kind of feedback is invaluable because it results from concrete, living contests between adversaries which sharpen and focus the issues, *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20-21 (1998); *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 382-83 (1980), whereas thorough adversarial testing does not occur at the rulemaking level. *See* Stith & Dunn, *supra* note 6; Joseph W. Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 Wash. U. L.Q. 1199 (1999); Samuel J. Buffone, *The Federal Sentencing Commission's Proposed Rules of Practice and Procedure*, 9 Fed. Sent. Rep. 67, 1996 WL 931745 (1996).

District court judges are also better-equipped than appellate courts to avoid unwarranted disparities, first because they see so many more cases, and second, as Congress recognized at the outset, because judges are "able to make informed comparisons between the case at hand and others of a similar nature . . . after a comprehensive examination of the characteristics of the particular offense and the particular offender." S. Rep. No. 98-225, at 52-53 (1983). Today, judges can make such comparisons based not only on the cases they sentence, but on sentences imposed by other judges as well. *See, e.g., United States v. Boyden*, No. 06-20243, 2007 WL 1725402 (E.D. Mich. June 14, 2007) (concluding that the guideline sentence would not avoid unwarranted disparity based on review of state and federal sentences in Michigan for similar and more serious conduct). Judges have access to confidential information on the precise sentencing reasons and statistics for all judges in their district. *See Richardson v.*

United States, 477 F. Supp. 2d 392, 402-05 (D. Mass. 2007). They can and do consult Commission statistics, Commission studies, and studies by other experts in order to impose sentences that avoid unwarranted disparities. *See, e.g., United States v. Miranda-Garcia*, Crim. No. 6:05-202, 2006 WL 1208013 (M.D. Fla. May 4, 2006); *United States v. Belvett,* Crim. No. 6:04-199, 2005 WL 852649 (M.D. Fla. Mar. 17, 2005).

This case illustrates both how a district court judge can contribute valuable information to the Commission by analyzing factors that the Commission treats narrowly in a more nuanced way through the prism of section 3553(a), and how the extraordinary circumstances test stifles the development and flow of useful information. The Guideline Manual deems age as "not ordinarily relevant." U.S.S.G. § 5H1.1. However, as the district court noted, the Commission has published a study, not reflected in the Manual, finding that recidivism rates drop as age increases. *United States v. Gall*, 374 F. Supp. 2d 758, 762 n.2 (S.D. Iowa 2005). The study shows that the recidivism rate for offenders under age 21 is 35.5%, that it drops to 31.9% for offenders age 21-25 (Mr. Gall's age at the time of the offense), and that it drops dramatically to 23.7% for offenders age 26-30 (his age at the time of sentencing). *See Measuring Recidivism*, *supra* note 14, at 28, Exhibit 9. What the Commission's study does not explain is *why* recidivism drops with age. One reason, according to research by the National Institutes of Health cited by the district court judge, is that the region of the brain that inhibits risky behavior is not fully formed until age 25. *Gall,* 374 F. Supp. 2d at 762 n.2. This was relevant to Mr. Gall's moral culpability as he committed the offense when he was 21, and was relevant to his current risk of recidivism at age 26. Pursuant to extraordinary circumstances review, the court of appeals deemed the study an

"improper factor." *United States v. Gall*, 446 F.3d 884, 890 (8th Cir. 2006).

Another example is the way in which the district court treated Mr. Gall's drug and alcohol addiction. The Guidelines forbid consideration of this circumstance. U.S.S.G. § 5H1.4. However, consistent with its view that prison is not an appropriate means of promoting rehabilitation, 18 U.S.C. § 3582(a), Congress suggested that the Commission might recommend that a drug dependent defendant be placed on probation in order to participate in a community drug treatment program. S. Rep. No. 98-225, at 173. Here, Mr. Gall's addiction to drugs and alcohol helped to explain his criminal activity, he was waging a successful battle against it, and the district court made treatment a condition of his probation. *Gall*, 374 F. Supp. 2d at 762, 763 n.4. As another district court judge has explained:

> The status of being addicted has an ambiguous relationship to the defendant's culpability. It could be a mitigating factor, explaining the motivation for the crime. It could be an aggravating factor, supporting a finding of likely recidivism. Barbara S. Meierhoefer, *The Role of Offense and Offender Characteristics in Federal Sentencing*, 66 S. Cal. L. Rev. 367, 385 (1992). On the other hand, the relationship between drug rehabilitation and crime is clear. If drug addiction creates a propensity to crime, drug rehabilitation goes a long way to preventing recidivism. In fact, statistics suggest that the rate of recidivism is less for drug offenders who receive treatment while in prison or jail, and still less for those treated outside of a prison setting. Lisa Rosenblum, *Mandating Effective Treatment for Drug Offenders*, 53 Hastings L.J. 1217, 1220 (2002).

Perella, 273 F. Supp. 2d at 164. The court of appeals gave no weight to this factor.

Finally, the district court gave considerable weight to aspects of Mr. Gall's conduct and character in ways the Guidelines fail to recognize, *i.e.*, his voluntary withdrawal from the conspiracy, completion of his college degree, employment and successful operation of his own business. The judge viewed Mr. Gall's financial profit from the offense from two relevant perspectives: On the one hand, he profited and therefore should be punished; on the other, though he had few financial resources, he turned his back on what was for him a highly profitable venture. These circumstances gave the district court great confidence that he would not recidivate and was not a danger to society. 374 F. Supp. 2d at 762-64. Under the Guidelines, sentences for drug offenses are driven by quantity, which, as in this case, often overstates the seriousness of the offense and overrides other, more relevant, circumstances.[24] To the extent the Guidelines can be said to recognize withdrawal from a conspiracy, it is only by excluding drug quantities the defendant did not agree to distribute in any event. U.S.S.G. § 1B1.3, comment. (n.2). And, although the Commission has found that education and employment predict greatly reduced recidivism, *Measuring Recidivism*, *supra* note 14, at 12, the Guideline Manual deems those

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[24] According to Paul J. Hofer, the Commission's Senior Research Associate, "the original Commission clearly preferred objective factors, such as drug weight or dollar amount, to subjective ones," but the result "is that important moral questions of culpability are relatively neglected, while more easily quantifiable issues of harm are elevated to a significance and exactitude beyond their worth. Even former Commissioners have noted that requiring judges to determine the exact amount of drugs or monetary loss involved in an offense gives the Guidelines a false precision." *Reason Behind the Rules*, *supra* note 4, at 70-71 (citing Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. Rep. 180, 1999 WL 730985 (1999)).

factors "not ordinarily relevant." U.S.S.G. §§ 5H1.2, p.s., 5H1.5, p.s.

Each of the district court's careful findings could provide valuable insight to the Commission and to other judges if permitted to stand. The court's analysis might suggest to the Commission that it collect and study pertinent research on brain development, and current research on the relationships among addiction, crime, treatment and recidivism. *See* 28 U.S.C. § 991(b)(1)(C) (directing Commission to ensure that sentencing policies and practices reflect advancement in knowledge of human behavior). It might suggest that, even on the wholesale level, the guidelines could recognize that quantity should not predominate over others factors with a greater bearing on sentencing purposes. The court of appeals, however, substituted its own judgment for that of the district court, finding that the district court (1) "gave too much weight to Gall's withdrawal from the conspiracy" because he "benefited" by not being sentenced under a later, more severe guideline (which would have violated the *Ex Post Facto* Clause) or for drug quantities distributed by others after he withdrew (which would have violated the Guidelines' definition of relevant conduct), (2) "did not properly weigh the seriousness of Gall's offense," citing the effects on health of using ecstasy which presumably explain why the drug is illegal, and (3) "placed too much emphasis on Gall's post-offense rehabilitation" because probation "lies outside the limited range of choice dictated by the facts of the case." *Gall*, 446 F.3d at 889-90.

This is not a common law of sentencing that is useful to other judges or the Commission. It undermines the quality and transparency of sentencing and prevents the Guidelines from evolving. As one judge recently observed,

while grappling with a remand based on his having mentioned his discomfort with the 100:1 crack-to-powder-cocaine sentencing ratio:

> The natural result of this will be to shield the guidelines from judicial scrutiny and to stifle the development of sentencing law. The Sentencing Commission will receive little meaningful input from district judges who, being on the front lines of sentencing issues but without a personal or professional stake in their outcome, are among those best able to provide objective, informed analysis.

Williams, 481 F. Supp. 2d at 1301-02; *see also United States v. Williams*, 472 F.3d 835, 847 (11th Cir. 2006) (Barkett, J., dissenting from denial of rehearing en banc) ("the panel opinion has the perverse effect of discouraging district court judges from stating the reasons for imposing sentence – the less they say, the less that can be used as a basis to reverse them.").

CONCLUSION

This Court should reverse the judgment of the Eighth Circuit, and make clear that, whether the sentence is inside or outside the advisory guideline range, the court of appeals must defer to the sentencing court's assessment of the facts and its judgment as to the appropriate sentence under § 3553(a), and may not engage in the aggressive review that most courts of appeals are now using. This will finally permit the kind of dialogue between sentencing

courts and the Commission, and among the courts, that was intended at the beginning.

Respectfully submitted,

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APPENDIX

RATIO OF REVERSALS FOR OUTSIDE-GUIDELINE SENTENCES

	All Circuits	Non-Extraordinary Circumstances Circuits Only[1]	Extraordinary Circumstances Circuits Only[2]
Outside Guideline Sentences	76 / 485 reversed (15.7 %)	7 / 118 reversed (5.9 %)	69 / 367 reversed (18.8 %)

RESULTS BY CIRCUIT

DISTRICT OF COLUMBIA: 0% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	0	0	Above Guideline	0	0
Below Guideline	0	0	Below Guideline	0	0

FIRST CIRCUIT: 41.7% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	2	1	Above Guideline	0	0
Below Guideline	5	0	Below Guideline	0	4

[1] The District of Columbia and the Second, Third, and Ninth Circuits have not adopted an "extraordinary circumstances" test for non-guideline sentences.

[2] The First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have adopted an "extraordinary circumstances" test for non-guideline sentences.

SECOND CIRCUIT: 6.7% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	14	0	Above Guideline	0	0
Below Guideline	13	0	Below Guideline	1	2

THIRD CIRCUIT: 2.8% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	15	0	Above Guideline	0	0
Below Guideline	20	0	Below Guideline	0	1

FOURTH CIRCUIT: 24.1% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	23	2	Above Guideline	0	0
Below Guideline	18	0	Below Guideline	0	11

FIFTH CIRCUIT: 10.9% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	54	1	Above Guideline	0	0
Below Guideline	3	1	Below Guideline	0	5

SIXTH CIRCUIT: 14.3% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	14	3	Above Guideline	0	0
Below Guideline	12	0	Below Guideline	4	2

SEVENTH CIRCUIT: 17.9% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	13	0	Above Guideline	0	0
Below Guideline	8	0	Below Guideline	2	5

EIGHTH CIRCUIT: 35.1% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	30	1	Above Guideline	0	0
Below Guideline	18	0	Below Guideline	2	26

NINTH CIRCUIT: 7.7% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	24	1	Above Guideline	0	0
Below Guideline	20	1	Below Guideline	4	2

TENTH CIRCUIT: 4.8% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	9	0	Above Guideline	0	0
Below Guideline	11	0	Below Guideline	0	1

ELEVENTH CIRCUIT: 7.9% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Above Guideline	47	0	Above Guideline	0	0
Below Guideline	18	0	Below Guideline	5	6

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IN THE

Supreme Court of the United States

BRIAN MICHAEL GALL,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit

DERRICK KIMBROUGH,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Fourth Circuit

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), and *Rita v. United States*, 551 U.S. __ (2007), for an appellate court to require that a sentence which lies outside the Guidelines range be justified by "extraordinary circumstances"?

2. May judges consider whether the Guideline ranges applicable to a given category of offenses fail to represent a sound balancing of all the factors pertinent to selecting the sentence for a particular case or group of cases within that category?

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in fifty states, including private attorneys, public defenders, and law professors. The NACDL seeks to promote the proper administration of justice and to ensure that criminal sentencing comports with our Constitution. NACDL's intense concern for protecting fundamental Fifth and Sixth Amendment rights has led it to appear frequently as *amicus curiae* in this Court, including in *Rita v. United States*, 551 U.S. __ (2007), *United States v. Booker*, 543 U.S. 220 (2005), *Blakely v. Washington*, 542 U.S. 296, 312 (2004) (noting NACDL's position), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *United States v. Booker*, 543 U.S. 220 (2005), this Court excised the provision of the Sentencing Reform Act requiring judges to sentence within the Guidelines range "[i]n most cases," *id.* at 234, because the Sixth Amendment prohibits a sentence "outside the range authorized by the jury verdict," *id.* at 240. After *Booker*, the district court must choose a sentence based on the factors listed in 18 U.S.C. § 3553(a)—including its requirement, found in subsection (a)(4), that the court consult the applicable Guidelines range—and the court of appeals reviews that sentencing decision for reasonableness. Nonetheless, after *Booker*, the Guidelines have continued, in practice, to exert much the same force as before. The Department of Justice requires

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties have consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

prosecutors to "actively seek sentences within the range established by the Sentencing Guidelines *in all but extraordinary cases*."[2]

Of particular significance in the two cases now before the Court, some courts of appeals, echoing the government's position, have held that a judge may not impose a sentence materially different from that recommended by the Guidelines absent "extraordinary circumstances," *see, e.g., United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005), and some have deemed "per se unreasonable" *any* non-Guidelines sentence that is "based on a disagreement" with the Sentencing Commission's balancing of factors for categories of cases, *United States v. Kimbrough*, No. 05-4554 (4th Cir. 2006), *Kimbrough* Pet. App. 2a (referring to "disagreement with the sentencing disparity for crack and powder cocaine offenses"). As a result, many important sentencing factors that judges are duty-bound to consider must nonetheless be given no significant weight on the premise that the Sentencing Commission has supposedly already taken them into account and incorporated them into (or disallowed them under) the Guidelines system itself. *See, e.g., United States v. Hampton*, 441 F.3d 284, 289 (4th Cir. 2006) (below-Guidelines sentence where defendant was the sole custodial parent of two small children was unreasonable, because "[f]amily ties and responsibilities" are an expressly "discouraged factor" under the Guidelines).

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[2] Memorandum from James B. Comey, Deputy Attorney General, U.S. Department of Justice, to All Federal Prosecutors, re: Department Policies and Procedures Concerning Sentencing (Jan. 28, 2005) at 2, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf (emphasis added); *id.* at 1 (prosecutors must "take all steps necessary to ensure adherence to the Sentencing Guidelines"). Consistent with this directive, the AUSA in *Kimbrough* objected to *any* sentence other than that within the Guidelines range. *Kimbrough* Pet. App. 30a. Whether this Court's decision in *Rita v. United States*, 551 U.S. __ (2007), will serve to rein in that tendency remains to be seen.

There are two fundamental defects in these approaches. *First*, these two rules do at least as much violence to the Sixth Amendment as the law this Court struck down in *Blakely v. Washington*, 542 U.S. 296 (2004). Under that state statute, the judge was merely *allowed* to impose a sentence exceeding the maximum authorized by "*facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 303 (emphasis in original). To forbid a so-called substantial deviation from the range specified by the United States Sentencing Guidelines absent extraordinary circumstances—and without an opportunity to challenge the soundness of the judgment reflected in a Guidelines calculation—is more detrimental to the defendant's Sixth Amendment rights than the Washington provision. The federal judge's findings of fact would *require* imposition of a sentence greater than that authorized by the jury's findings unless *the defendant* carries the heavy burden of proving extraordinary mitigating circumstances. In the typical case—*i.e.*, one where extraordinary mitigating circumstances are not present—the result *must* be a sentence that "the jury's verdict alone does not authorize." *Id.* at 305. Such a "remedy" is foreclosed by the Sixth Amendment. *Booker*, 543 U.S. at 234 (holding mandatory Guidelines unconstitutional because the judge is "*bound*" to a within-Guidelines sentence in "most cases") (emphasis added).

Second, even if *Blakely* and *Booker* could permit a system that heavily relies on the Guidelines, the theoretical and empirical bases for these two tools of appellate review are demonstrably false. The Sentencing Commission decided it was not feasible to construct a system producing sentences designed to achieve each purpose of sentencing listed in Section 3553(a)(2). Moreover, the Commission did not, because it could not, implement a system that differentiates between particular defendants based on the Section 3553(a) factors, most notably differences in the "history and characteristics" of otherwise similarly-situated defendants. *See* 18 U.S.C. § 3553(a)(1). Thus, because certain Section 3553(a) factors as applied to a particular case may be at the same time both

"ordinary" and inadequately accounted for in the Guidelines, the rules imposed by the Fourth and Eighth Circuits in these two cases require district judges to abdicate their duties under Section 3553(a).

The proper formulation of reasonableness review—a formulation that complies with the Sixth Amendment, is true to the language of the SRA, and recognizes the limitations inherent in the Guidelines—is one that gives the district court appropriate deference under the abuse of discretion standard fashioned by this Court in *Rita* and *Booker* and that focuses on whether the district judge considered *all* of the pertinent statutory factors as they apply to that *particular* case. The court of appeals should also examine whether the judge, after considering those factors, complied with the duty to impose a sentence sufficient, but "not greater than necessary" to achieve the statute's purposes. 18 U.S.C. § 3553(a). This inherently individualized process is not aided by requiring extraordinary circumstances before a sentence can "deviate" from a so-called "benchmark" that was created for classes of cases and that will frequently be the product of an incomplete or even erroneous assessment of the very factors and purposes *judges* must consider on a case-by-case basis.

ARGUMENT

I. A Requirement Of Extraordinary Circumstances For Sentences That Differ In A Nontrivial Manner From Those Suggested By The Guidelines, And A Prohibition On Taking Into Account Whether The Guidelines Reflect An Unsound Judgment, Are Each Inconsistent With This Court's *Booker* Decision.

The Eighth Circuit's requirement of extraordinary circumstances for what it deems a substantial "variance" from the Guidelines violates the Sixth Amendment because in the application of that standard to the "ordinary" defendant—one whose circumstances fall short of "extraordinary"—the dis-

trict court not only is *permitted* to impose a sentence greater than that available based on jury findings alone; it is *required* to do so. The Sixth Amendment forbids either result. *See Blakely*, 542 U.S. at 305 n.8 ("Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.") (emphases in original). Similarly, the rule applied in *Kimbrough*—that it is "per se unreasonable" to rely on a "disagreement" with the judgment reflected in a Guidelines provision when justifying a sentence outside the recommended range—restricts the discretion of judges in a manner indistinguishable from the provision that was excised from the Sentencing Reform Act in order to make the Guidelines advisory. *See* 18 U.S.C. § 3553(b)(1). Thus, on constitutional grounds alone, these two modifications to the reasonableness standard of review for federal sentences must be rejected. This issue is properly before this Court because (i) both rules present a multitude of constitutional problems, and (ii) *Booker* held that Congress did not intend one set of rules for sentences above the Guidelines and a different set for those below.

A. The Standards Employed By The Fourth and Eighth Circuits Violate The Sixth Amendment.

1. The extraordinary circumstances requirement resurrects the feature of the mandatory Guidelines that violated the Sixth Amendment. Under the Eighth Circuit's test, a district court may not substantially "deviate" above or below the advisory range unless the judge finds facts that establish extraordinarily aggravating or mitigating circumstances. The less aggravating (or mitigating) the circumstances the judge finds, the smaller the allowed "deviation" from the advisory range. *See, e.g., United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006) ("How compelling [the] justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed."). The very phrasing of the Eighth Circuit's "extraordinary circum-

stances" requirement illustrates its inconsistency with the advisory Guidelines remedy adopted in *Booker*. The Eighth Circuit's formulation continues the pre-*Booker* requirement that district judges treat the Guidelines range as the presumptive sentence—a substantive starting point—with the reasonableness of any other sentence judged by the extent to which it "deviates" or "varies" from that presumptive range. Gall Pet. App. A 8-9 ("'the farther the district court varies from the *presumptively reasonable* guidelines range, the more compelling the justification based on the § 3553(a) factors must be'" (emphasis added) (citation omitted)). Such a presumption at the district court level for Guidelines sentences is no longer an option. *See Rita*, slip op. at 11-12 (emphasizing that the presumption of reasonableness for a within-Guidelines sentence only operates at the appellate level; it may not be used by district judges).

The extraordinary circumstances requirement thus restores the Guidelines to a position that violates the Sixth Amendment. In particular, because the circumstances in the mine-run of cases are—by definition—not "extraordinary," in most instances this rule prevents judges from imposing a sentence substantially outside the advisory range. Allowing judges to venture substantially above or below a Guidelines range in the "extraordinary" case is no cure for the Sixth Amendment defect, just as the mandatory Guidelines were not saved by the ability to depart in special cases. *See Booker*, 543 U.S. at 234 ("The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself."); *see also* 18 U.S.C. § 3553(b)(1) (provision that, until it was excised, permitted a sentence outside the Guidelines range only where there existed "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission").

Indeed, forbidding substantially higher or lower sentences absent a finding of extraordinary circumstances institutes a regime indistinguishable from that invalidated in

Blakely. The state law in *Blakely* similarly limited a defendant's sentence to a "standard range," dictated by the offense of conviction, unless the judge found "'substantial and compelling reasons justifying an exceptional sentence.'" 542 U.S. at 299. This Court held that a sentence above the standard range, based on the judge's finding that Blakely had acted with deliberate cruelty, violated the Sixth Amendment because it exceeded the penalty the judge could impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303 (emphasis omitted).

Unlike the appellate presumption of reasonableness upheld in *Rita*, the requirement of "extraordinary circumstances" presents a "multitude of constitutional problems" that are far from hypothetical. *Cf. Rita*, slip op. at 14. As noted, the constitutional problem will exist as to every "ordinary" defendant, for whom any significant "deviation" from the Guidelines is forbidden under the Eight Circuit's rule. Absent the defendant's waiver of his Sixth Amendment rights, judge-made findings will be involved in a significant number of these "ordinary" cases, and they will spell the difference between reasonable and unreasonable sentences under the Eighth Circuit test. For instance, in drug cases, which represent about 35% of all federal sentences,[3] the "base" offense level is determined largely by the quantity of drugs deemed "relevant" under a unique and complex set of rules set forth in the Guidelines. U.S. SENTENCING GUIDELINES MANUAL ("USSG") § 1B1.3. This "relevant" quantity can include drugs involved in counts that were dismissed, and

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[3] U.S. Sentencing Commission, *2006 Sourcebook of Federal Sentencing Statistics*, Distribution of Offenders in Each Primary Offense Category, *available at* http://www.ussc.gov/ANNRPT/2006/Figa.pdf (for 35.5% of sentenced defendants, drug violations were the primary offense). The available data for fiscal year 2007 show a small increase. U.S. Sentencing Commission, *Preliminary Quarterly Data Report (2nd Quarter Release 2007)* at 39, *available at* http://www.ussc.gov/sc_cases/Quarter_Report_2Qrt_07.pdf (36.3% of sentenced defendants).

even counts of which the defendant was acquitted or for which there was no charge at all. *See, e.g., United States v. Watts*, 519 U.S. 148 (1997) (per curiam).[4]

Fanfan's case (which was consolidated with Booker's) illustrates the problems faced by virtually all drug defendants under the extraordinary circumstances test. The findings by the jury convicting Fanfan supported a Guidelines range of 63-to-78 months. *Booker*, 543 U.S. at 228. The extraordinary justification rule, however, would have compelled Fanfan's judge to sentence him within or not significantly outside the 188-to-235 month range based on *judicially*-found facts. Indeed, the court would have been required to sentence Fanfan to well above the *maximum* of the range supported solely by the jury's findings unless *the judge* could find *additional*, mitigating facts—facts extraordinary enough to support a sentence almost ten years below the judicially-determined range.

Many other Guidelines also dictate higher sentence ranges based on findings made by the judge rather than the jury, not the least of which are those for theft and fraud cases. *See* USSG § 2B1.1 (numerous aggravating factors, including potentially significant enhancements for amount of loss); *2006 Sourcebook of Federal Sentencing Statistics* (10 percent

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[4] Moreover, the Guidelines Manual contains many more levels of gradation for drug quantity than does the statute defining the offense. *Compare* 21 U.S.C. § 841(b)(1) (containing three levels of penalty gradation due to drug quantity for most controlled substances, including cocaine, cocaine base (crack), heroin and marijuana) *with* USSG § 2D1.1(c) (containing at least 14 different offense levels for such drugs). The Guidelines, rather than mandatory minimums, dictate the sentence in a large number of drug cases. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* ("*Fifteen Year Report*") (2004), http://www.ussc.gov/-15_year/15year.htm (determining that, as of 2001, more than 25 percent of the average expected prison time for drug offenders can be attributed to Guideline increases above the statutory mandatory minimum penalty levels).

of cases). In sum, the extraordinary circumstances requirement *compels* sentences within or proximate to sentencing ranges enhanced by judicial fact-finding—that is, facts neither found by the jury nor admitted by the defendant—in all but the most exceptional cases, much like the unconstitutional "mandatory guidelines" system did before *Booker*.

In its brief in *Claiborne v. United States*, No. 06-5618, the government defended the extraordinary circumstances test against a Sixth Amendment challenge by arguing that under the advisory Guidelines a judge retains the authority, armed solely with jury findings, to impose a sentence up to "the statutory maximum provided in the United States Code." Resp. Br. in *Claiborne* 41-42. But under the government's extraordinary circumstances test, that simply is not true. The jury finds the bare elements of an offense, and such findings—because they are the same for any trial involving the same alleged statutory violation—do nothing to establish why the particular case might be extraordinary, let alone extraordinary enough to warrant the statutory maximum sentence. *See* Resp. Br. in *Claiborne* 43 (identifying "extraordinary circumstances" as those factors that "substantially distinguish [the defendant] from the hundreds of other defendants who share the same general characteristic."); *see also Cunningham v. California*, 549 U.S. __, __ (2007), slip op. at 6 (Alito, J., dissenting) (noting that a judge would not be able to justify the statutory maximum sentence in a mail fraud case without finding additional facts at sentencing).

The government argues that the "extraordinary circumstances" test has no application to insubstantial "variances" from the Guidelines range in non-extraordinary cases. *See* Resp. Br. in *Claiborne* 38. This is not so. Many circuits apply the test to require additional factfinding for *any* non-Guidelines sentence. *See* Gall Br. 10 n.2. In any event, it would not cure the Sixth Amendment violation to know that insubstantial "variances" from the Guidelines range could be accomplished without additional non-jury findings. Even *that* version of the extraordinary circumstances test does

nothing more than resurrect mandatory Guidelines ranges with an "insubstantial" number of months tacked on to each end of the range.[5] The result of the government's test, there-

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[5] It is far from clear how one determines when the line between insubstantial and substantial (or between ordinary and extraordinary) has been crossed. *See* Gall Pet. App. A 9 ("extraordinary" variances); *Claiborne*, 439 F.3d at 481 ("substantial" variances). Even if such a line could be devised in theory, it would be unworkable in practice due to the presence of many variables and the non-uniform structure of the table of sentencing ranges. These features prompt multiple questions for which there are no easy answers. For example, should "substantial" or "extraordinary" variances be based on the absolute number of months or a percentage calculation? The choice has a significant effect, especially at the low and high ends of the sentencing table. How should the breadth of the range affect the drawing of the line? The sentence ranges in the Guidelines Manual vary greatly in their breadth—as few as six months between top and bottom at the low end of the table; as many as 81 months near the high end—and others defy quantification altogether, such as "360 months to life" and "life." Should a substantial upward variance from a particular range always be the same number of months (or percentage difference) as a substantial *downward* variance from the same range, or should "substantial upward" mean something different than "substantial downward" depending on where the range falls in the table? Near the high and low ends of the table a percentage approach would lead to very different results than an absolute approach. How are probationary sentences—such as petitioner Gall's—accounted for, especially when they can come with conditions that are akin to imprisonment (*e.g.*, home confinement, confinement in a community correctional center, confinement in a jail on weekends), or conditions less like imprisonment but nonetheless onerous (*e.g.*, travel restrictions, reporting requirements, and employment and community service mandates, all of which can differ significantly from case-to-case in their severity), or varying combinations of the two. (The Eighth Circuit would deem *any* non-Guidelines sentence of probation, no matter how low the minimum of the Guidelines range, "a 100% downward variance" because the defendant "will not serve any prison time." Gall Pet. App. A 9. But probation is not like a shorter prison term; it is an entirely different kind of sentence. 18 U.S.C. § 3551.) Whatever the answers to these questions, the government's test assumes that for any given Guidelines range a number of months above and (perhaps a different) number of months below the range will mark the dividing line between ordinary/insubstantial and extraordinary/substantial variances.

fore, is a new *de facto* set of Guidelines ranges—a bit larger than the ranges in the Manual,[6] but ranges nonetheless. Instead of a requirement of extraordinary circumstances to sentence outside the ranges in the Manual, the proposed test requires extraordinary circumstances to impose a sentence outside the somewhat larger *de facto* range.[7] Nothing in *Booker* supports the notion that Congress can cure the Sixth Amendment violation by reinstituting mandatory Guidelines ranges and simply making them a bit wider. The courts of appeals are likewise barred from creating such a remedy through the reasonableness standard of review.

2. The rule applied by the Fourth Circuit in *Kimbrough* suffers from the same constitutional defect. It prevents a sentence from being based, even in part, on the judge's reasoned conclusion that the Commission struck an improper balance when weighing Section 3553(a) factors for a particular category or sub-category of offenses. *Kimbrough* held it was "per se unreasonable" for a non-Guidelines sentence to be based to any extent on the court's "disagreement with the sentencing disparity for crack and powder cocaine offenses." *Kimbrough* Pet. App. 2a. The Sentencing Commission itself has recognized that the purposes of punishment do not invariably require that trafficking in a given amount of crack be treated the same as trafficking in 100 times that amount of

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[6] By statute (and with limited exceptions), the top of a sentencing range may be no more than 25 percent greater than the bottom of that range. 28 U.S.C. § 994(b)(2). For example, the Guidelines are allowed to (and do) have a range of 100-to-125 months, but they could not have a range of 100-to-140 months.

[7] Another example illustrates the constitutional violation. Suppose a defendant's Guidelines range is 33-to-41 months, and the statutory maximum is 120 months. Assuming any sentence greater than 60 months would be a "substantial variance," a judge could not impose such a sentence without finding the existence of extraordinary circumstances. Any sentence between 60 and 120 months would therefore exceed the maximum authorized by facts reflected in the jury verdict or admitted by the defendant.

powder cocaine. U.S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002). The sentencing judge in *Kimbrough* reasoned from the available information that the differences between the circumstances of petitioner's crack offense and the circumstances of many powder cocaine offenses were not so great as to require imposition of the dramatically more severe within-Guidelines sentence.[8] The Fourth Circuit's holding prevents a judge from ever concluding that the Commission's "wholesale" rule for crack offenses creates sentences greater than necessary at the "retail" level of sentencing. *Cf. Rita*, slip op. at 9 (noting that the Commission and the sentencing judge separately carry out the Section 3553(a) objectives: "the one, at retail, the other at wholesale").

Judges must be free to conclude, based on reasoned analysis, that the Commission's balancing of factors produces sentences that are either too lenient ("[in]sufficient") or too severe ("greater than necessary"). If not, then their discretion will be at least as limited as it was under the mandatory regime that this Court invalidated on Sixth Amendment grounds. Section 3553(b)(1), now excised, had required judges to impose a Guidelines sentence unless they found "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines" and that "should result in a" non-Guidelines sentence. To prohibit sentencing courts from questioning the Commission's judgment with respect to those circumstances that it *did* take into consideration in formulating the Guidelines is to limit the judicial inquiry to whether the Commission in fact took the

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[8] The district judge did not treat crack and powder cocaine on anywhere near an equal footing. Had the crack cocaine that Kimbrough possessed still been in powder form, he would have faced no mandatory minimum term and could have received a within-Guidelines sentence of 30 months rather than the 120 months the court imposed for that count. *Kimbrough* Pet. App. 22a.

circumstances into consideration *at all*. Because that is at least as narrow as the inquiry whether the Commission "adequately" took a circumstance "into consideration," the rule adopted by the Fourth Circuit simply resurrects the provision that this Court excised to cure the Sixth Amendment defect in the Guidelines.

3. Given the restraints imposed by the Fourth and Eighth Circuits, it should come as no surprise that reasonableness review in those courts has prevented judges from imposing non-Guidelines sentences unless they meet the criteria for departures under the mandatory regime. *See, e.g.*, *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005) (below-Guidelines sentence based on the defendant's cooperation was unreasonable, because that "departure" exceeded the Guidelines' limits on "substantial assistance" downward departures); *United States v. Green*, 436 F.3d 449, 459 (4th Cir. 2006) (reversing below-Guideline sentence based on the defendant's efforts to obtain employment, his level of education, the non-use of a firearm, and his likelihood of contributing to society, because those factors are excluded from the Guidelines).

These courts have simply resurrected 18 U.S.C. § 3742(e)—the appellate review provision excised in *Booker*. That statute directed courts of appeals to determine, among other things, whether a sentence "departs from the applicable guideline range based on a factor that . . . is not authorized under section 3553(b)" or "departs to an unreasonable degree from the applicable guidelines range, having regard for" the Section 3553(a) factors and the reasons stated by the district court. 18 U.S.C. § 3742(e)(3). The Fourth Circuit's rule prevents judges from sentencing outside the Guidelines unless the factor is "authorized under section 3553(b)" (that is, unless the Commission has failed to adequately take the circumstance into account), and the Eighth Circuit's rule examines whether the sentence "departs to an unreasonable degree from the applicable guidelines range." Just as Section 3742(e) needed to be excised to effectuate the remedy

adopted in *Booker*, the Sixth Amendment bars the adoption of appellate review tools that largely revive the mandatory Guidelines system. Under the "extraordinary deviation" rule, it is exactly as if § 3553(b)(1) had never been stricken from the statute. But it was the judicial striking of that section that rescued the Act from its constitutional flaw. It follows that the tests applied below revive the Sixth Amendment violation thought to have been remedied in *Booker*.

B. The Sixth Amendment Issue Is Properly Before The Court.

The Sixth Amendment forbids sentences greater than those authorized by the jury's findings. Petitioners Gall and Kimbrough received sentences *below* the Guidelines ranges that were calculated in their cases, and the courts of appeals reversed using the rules of appellate review at issue here. The Court must reject these rules on Sixth Amendment grounds, regardless of whether their application in these two cases violated petitioners' constitutional rights. That is because (i) both rules present a multitude of constitutional problems, and (ii) *Booker* held that Congress did not intend one set of rules for sentences above the Guidelines and a different set for those within or below the Guidelines. *Booker*, 543 U.S. at 266; *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (in deciding between two interpretations of a statute, "[i]f one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain *to the particular litigant before the Court*.") (emphasis added).[9]

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[9] That is not to say, however, given the statute's preference for the more parsimonious sentence, that review of sentences above the recommended range should not be subject to more stringent scrutiny than is applied to sentences within or below. The more severe the sentence, after all, the more likely it is to be "greater than necessary." 18 U.S.C. § 3553(a).

In *Rita*, the Court rejected the petitioner's Sixth Amendment "concerns," *Rita*, slip op. at 12, holding that an appellate presumption of reasonableness for a Guidelines sentence "does not violate the Sixth Amendment." Slip op. at 13. In particular, the Court noted that this "nonbinding appellate presumption . . . does not *require* the sentencing judge" to impose a Guidelines sentence, and "[s]till less does it *forbid* the sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone." *Rita*, slip op. at 14 (emphases in original). The same cannot be said for the rules at issue in *Gall* and *Kimbrough*. As noted *supra*, if a judge needs to find extraordinary circumstances to impose a sentence significantly higher than the judicially-determined sentence range—let alone a sentence significantly higher than that authorized by the jury's verdict—then the Eighth Circuit's requirement *does* forbid the judge from "imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone." The judge in *Fanfan*, for example, could not have imposed a sentence above or even *within* the petitioner's Guidelines range of 188-to-235 months based solely on jury-determined facts. *Booker*, 543 U.S. at 228.

As the Court made clear in *Rita*, an appellate presumption of reasonableness for a within-Guidelines sentence is not a presumption of unreasonableness for a non-Guidelines sentence. *Rita*, slip op. at 15. *Rita* therefore had no occasion to address when a non-Guidelines sentence might be unreasonable. The instant cases squarely present the issue. Moreover, under this Court's rulings in *Booker* and *Clark*, review for reasonableness for sentences below the Guidelines must be fashioned in such a manner that application of the same rule to sentences *above* the Guidelines does not violate the Sixth Amendment. *Clark*, 543 U.S. at 380-81; *Rita*, slip op. at 7 n.2 (Scalia, J., concurring) ("since reasonableness review should not function as a one-way ratchet, *United States* v. *Booker*, 543 U.S. 220, 257-258, 266 (2005), we must forswear the notion that sentences can be too low in light of the need to abandon the concept that sentences can be too high").

To avoid the Sixth Amendment violations that would occur in many scenarios if the rules adopted by the Fourth and Eighth Circuits rules were allowed to stand, those rules must be rejected in these cases, too.

On constitutional grounds alone, the standards of review used in the Fourth and Eighth Circuits must be rejected.

II. Because Of The Inherent Limitations Of Any Guidelines System, And The Demonstrated Limitations Of The One In Place, A District Court Must Be Permitted To Conclude That The Guidelines Do Not Always Strike The Correct Balance And That Materially Different Sentences Are Justified In The Absence Of Extraordinary Circumstances

The Eighth Circuit's principal basis for requiring extraordinary circumstances for sentences significantly outside the Guidelines is that they supposedly "were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study," *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006). As demonstrated below, despite aspirations to the contrary, the Guidelines do not manage to balance and incorporate *all* of the purposes of sentencing found in Section 3553(a)(2), much less do they differentiate individual defendants from one another based on *all* of the other factors a judge must consider under Section 3553(a) in each case. The Commission itself acknowledged, when first promulgating the Guidelines, that it was impossible to devise a guidelines system that captures and accounts for "the vast range of human conduct potentially relevant to a sentencing decision." USSG ch. 1, pt. A(4)(b) (1987). At best, the Guidelines, "insofar as practicable," represent "*a rough approximation* of sentences which *might* achieve § 3553(a)'s objectives." *Rita*, slip op. at 11 (emphases added). And while it is true that the Commission's amendment process was designed to carry out a continued refinement of the Guidelines to better approach these aspirations, in practice it

has not performed in that manner. Rather than move the Guidelines in the direction of balancing and incorporating Section 3553(a)'s sentencing purposes and factors, the amendment process has had the opposite effect.

A. The Guidelines Are Not The Product Of A Flawless Balancing Of All The Sentencing Purposes That A Judge Must Consider Under Section 3553(a)(2), But Of An Incomplete Empirical Approach Based On "Past Practice."

Section 3553(a)(2) of Title 18 requires judges to impose sentences that, among other things, "comply with" the following "purposes" of sentencing in each particular case: "reflect the seriousness of the offense"; "promote respect for the law"; "provide just punishment for the offense"; "afford adequate deterrence to criminal conduct"; "protect the public from further crimes of the defendant"; and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." The judge must do so after "consider[ing]" other factors listed, inter alia, in § 3553(a)(1) and (a)(6).

One of the Commission's basic objectives is also to "assure the meeting of the purposes of sentencing as set forth in [§ 3553(a)(2)]." 28 U.S.C. § 991(b). As early as the first Guidelines Manual in 1987, the Commission acknowledged, however, that it was unable to take each of these purposes of sentencing into account in crafting Guidelines ranges. *See* USSG ch. 1, pt. A(3) (1987). This Court recognized as much in *Rita*, when it noted that the Commission did not attempt to balance (*i.e.*, "reconcile") the purposes of sentencing, taking an "empirical approach" instead. *See Rita*, slip op. at 9-10 (noting a "'philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment'" and that, "[r]ather than choose among [such] differing practical and philosophical objectives, the Commission took an 'empirical approach'"). As one original commissioner explained, "[r]ather than being

guided by the statutory purposes of sentencing, the guideline drafting reflected simply a haphazard 'fiddling with the numbers' that established the guidelines sentences." *Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission*, 52 Fed. Reg. 18,121, 18,122 (May 1, 1987).

In the end, even the "past practice" benchmark was abandoned as to a large number of categories; the Commission chose to increase sentences for some offenses, but not others, through a series of "'trade-offs' among Commissioners with different viewpoints." Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19 (1988). Over time, these "trade-offs" have worked to substantially lengthen sentences[10]—and so has the Commission's peculiar interpretation of "past practice," which has produced Guidelines ranges which do not reflect the large number of prior sentences that had resulted in probation. *See* Washington Legal Foundation Amicus Br. in *Claiborne* 11-12.

In sum, although the Commission may very well have done the best it could under the circumstances, it is abundantly clear—as this Court noted in *Rita*—that the ranges in that Manual are *not* the product of a *balancing* of the sentencing purposes every judge is required to consider under Section 3553(a)(2). And the Commission was never directed to incorporate most aspects of § 3553(a) other than the (a)(2) purposes into the Guidelines, even though those other factors are binding on judges in individual cases. As a result, the Guidelines may point to a result different from that obtained by a careful judicial balancing of those purposes even in so-called "ordinary" cases. For that reason, an extraordinary

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[10] Defendants sentenced in 2002 will spend, on average, twice as long in prison as those sentenced prior to the Sentencing Reform Act. *Fifteen Year Report* at 46, 47, and 49.

circumstances requirement has no place in an advisory Guidelines system.

B. The Guidelines Do Not Account For Important Section 3553(a) Factors, Such As The "History And Characteristics Of The Defendant."

In addition to their failure to take account of—much less carefully balance—each purpose of sentencing listed in Section 3553(a)(2), the Guidelines were not designed to differentiate between defendants with respect to the other Section 3553(a) factors that judges must consider but which the Commission was not directed in 28 U.S.C. § 991(b) or § 994 to implement. The Commission was charged, after all, with developing Guidelines applicable to "categories of offenses" and "categories of defendants," *id.* §§ 994(c)-(d), not with selecting sentences for individual cases.

1. Significantly, the Guidelines do not implement a vital component of subsection (a)(1)—the need to consider the "history and characteristics of the defendant." From the beginning, the Guidelines have produced sentencing ranges that take into account only one narrow slice of a defendant's "history and characteristics": the aggravating factor of prior criminal history. *See generally* USSG ch. 4. The original commissioners "extensively debated" whether the Guidelines ranges should be affected by offender characteristics beyond the defendant's criminal record, Breyer, 17 Hofstra L. Rev. at 19, but they were unable to reach a consensus and therefore decided "to leave other characteristics out." Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 185 (1999).

The Guidelines ranges do not incorporate any other offender characteristics or any other aspects of their history. Instead, to the extent the Commission has addressed these factors, it expressly discourages or outright prohibits judges from considering them when computing a Guidelines range or when deciding whether to impose a Guidelines sentence.

These characteristics include, among others, family ties and obligations, USSG § 5H1.6 (p.s.), military service, *id.* § 5H1.11 (p.s.), community good works, *id.*, addictions and other dependencies, *id.* § 5H1.4 (p.s.).

The Commission's inability to incorporate these offender characteristics into the computation of a Guidelines range is unsurprising. It is *not* possible to quantify in a meaningful way—*i.e.*, one that differentiates defendants in the current grid of sentence ranges—such factors as a defendant's family obligations; the influence of addiction or other dependencies and difficulties on the commission of the offense; or the degree to which the defendant engaged in good works before or after committing the offense.[11] As one judge has observed, the Guidelines are "inescapably generalizations" that 'say little about the 'history and characteristics of the defendant.'" *United States v. Jiménez-Beltre*, 440 F.3d 514, 527 (1st Cir. 2006) (Lipez, J., dissenting). Moreover, an offender characteristic that warrants a significant sentence reduction in one case (*e.g.*, a history of strong family ties and responsibilities) might be less compelling than otherwise would be the case if coupled with other factors (*e.g.*, the defendant made a calculated decision to entice close family members into joining his criminal activity despite having a strong support system that gave him ample opportunity to lead a law-abiding life). Because the weight to be given any particular offender characteristic requires careful case-by-case consideration of the interplay of multiple factors, such characteristics are inherently unsuited to the generalizations required in any guidelines system.

As a result of the difficulty in accounting for offender characteristics in a system that must quantify and generalize

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[11] The one factor the Commission did incorporate—prior criminal history—is, in a number of ways, susceptible to an objective formula based on the number of prior convictions, the recency of past offenses, and their severity (as measured by length of sentence imposed or served). *See* USSG ch 4.

factors, with the exception of the aggravating factor of criminal history the Guidelines are focused *entirely* on the offense as opposed to the person who committed it. But even there they frequently fail to differentiate based on such things as criminal intent.[12] In choosing not to delineate "categories of defendants" based on these and other aspects of their offenses, the Guidelines cannot be said to already account for the factors in Section 3553(a)(1), particularly as those factors may arise in individual cases.

C. The Guidelines Have Not Eliminated Unwarranted Sentence Disparities.

Another statutory factor that judges must consider is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Minimizing such disparities was one of the primary objectives of the Sentencing Guidelines, 28 U.S.C. § 994(f), but in a number of ways, the Guidelines have perpetuated and even aggravated the problem of unwarranted disparities.

As the Sentencing Commission has recognized, "unwarranted disparity" means the "[1] different treatment of *individual* offenders who are similar in relevant ways, or [2] similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing." *Fifteen Year Report* at 113 (emphasis in original). The Guidelines, by limiting consideration of numerous factors

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[12] Even when considered, intent works in only one direction. Intended harms increase the sentence even if they do not occur. *See, e.g.*, USSG § 1B1.3(a)(3) (including "all harm that was the object" of acts and omissions) & 2D1.1. cmt. n.12 (drug quantity includes amounts attempted or agreed upon). Yet no reduction is made to account for harms that were unintended or controlled by law enforcement. *See, e.g., id.* (addressing controlled drug deliveries); *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004) (noting that loss amount in many fraud cases "is a kind of accident" and thus a "relatively weak indicator of the moral seriousness of the offense or the need for deterrence").

and circumstances (age, employment, military service, rehabilitation), have increased the second type of unwarranted disparity—*the like treatment of cases that are not truly alike.* Ilene Nagel, one of the original commissioners, acknowledged this problem—she dubbed it the "overreaching uniformity" of the Guidelines—noting that "the emphasis [in creating the first set of guidelines] was more on making sentences alike, and less on insuring the likeness of those grouped together for similar treatment." Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 934 (1990).

The Guidelines also suffer severe shortcomings in addressing the other type of disparity—different treatment of individual offenders who are similar in relevant ways. Numerous studies have confirmed that because charge- and fact-bargaining occurs in a sizable number of cases, Guidelines ranges for defendants who should be identical in the eyes of the Guidelines will often be different.[13] For example Professor Stephen Schulhofer and former-Commissioner Nagel found that the Guidelines were circumvented in approximately twenty to thirty-five percent of all plea-bargains, Ilene Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1284, 1290 & n.25 (1997), with the extent of the deviations from appropriate guideline calculations ranging between "modest" (ten to twenty-five percent) and "enormous" (seventy to ninety per-

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[13] Additionally, far from helping eliminate nationwide disparities as the government claims, the Guidelines have contributed to geographical disparities. *Fifteen Year Report* at 86; *see also* U.S. Sentencing Commission, *Downward Departures from the Federal Sentencing Guidelines*, at 66-67 (2003), http://www.ussc.gov/departrpt03/departrpt03.pdf ("Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs.").

cent), *id.* at 1292.[14] Ironically, it is the so-called "real offense" provisions (*e.g.*, the weapon and quantity enhancements in drug cases and the loss amount for economic crimes)—the centerpiece of guidelines sentencing (*see, e.g.*, *Fifteen Year Report* at 24-25)—that provide the most fertile ground for abusive plea negotiating tactics. *See* Nagel, 80 J. Crim. L. & Criminology at 937.[15]

Perhaps the most troubling manifestation of unwarranted sentencing disparity prevalent in the current guidelines system is the gap between average sentences of white and minority offenders. "[R]elatively small in the preguidelines era," this gap has grown substantially since the advent of the Guidelines. *Fifteen Year Report* at 115, 116, 120-27. The Commission itself has concluded that these disparities are not "a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges"; rather they are attributable to an "'*institutional unfairness*' *built into the sentencing rules themselves*." *Id.* at 135 (emphasis added) (internal citation omitted). Although the Commission specifically identified the 100:1 quantity ratio for powder and crack cocaine—a

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[14] Similarly, the federal probation offices in forty-three percent of all districts report that when "guideline calculations are set forth in a plea agreement, they are supported by offense facts that accurately and completely reflect all aspects of the case" *no more than half* the time. *Fifteen Year Report* at 86 (internal quotations and citations omitted). And in yet another survey, this one conducted by the Federal Judicial Center, three-quarters of district judges reported that plea bargaining is a "source of hidden unwarranted disparity in the guidelines system." Federal Judicial Center, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey* at 7, 9 (1997), *available at* http://www.fjc.gov/-public/pdf.nsf/lookup/gssurvey.pdf/SFile/gssurvey.pdf.

[15] In addition, there is the inevitable distorting effect of unintentional error by Probation Officers, attorneys and judges, much of it resulting from the very complexity of the Guidelines system itself. Unwarranted disparity which the Guidelines cannot control also results from the inevitable variation in skill and knowledge among defense counsel, a subject with which amicus NACDL is particularly familiar.

ratio that substantially increased petitioner Kimbrough's Guidelines range—and the career offender Guideline as provisions that have "unwarranted adverse impacts on minority groups without clearly advancing a purpose of sentencing," it acknowledged there may be "many others." *Id.* at 131-34. A Guidelines system that *increases* racial disparities in sentencing cannot be a benchmark from which only "extraordinary circumstances" warrant materially different outcomes.

Accordingly, the Guidelines should not be followed simply because that would achieve greater uniformity, as the government claims. Not only is uniformity just one of several considerations under Section 3553(a), but rigid adherence to the Guidelines will not advance that objective. In fact, in Kimbrough's case, imposing a *below*-Guidelines sentence reduces unwarranted disparity by treating him like similar low-level offenders.

D. The History Of Amendments To The Guidelines Further Undermines Any Argument For Applying The Rules Employed In The Fourth And Eighth Circuits.

Another reason advanced for requiring proportionally "substantial" circumstances for non-Guidelines sentences is that the Guidelines have been refined over time based on several years of sentencing experience and studies. The history of the Guideline amendment process thoroughly refutes this argument, demonstrating that the amendment process has proven incapable of incorporating Section 3553(a)'s purposes and other sentencing factors into the Guidelines—even though Congress, the Commission, and this Court envisioned such a process, *see Mistretta v. United States*, 488 U.S. 361, 379 (1989); 28 U.S.C. § 994(o).

When the original Commission determined it could not base its Guidelines ranges on a principled application of the statutory purposes of sentencing listed in Section 3553(a)(2), it intended to make up for that shortcoming in later revisions:

(1) incorporating the findings of the Commission's "continuing research, experience, and analysis," *id.* at pt. A(2); and (2) developing a sentencing "common law," whereby judges would "remain free to depart from the Guidelines' categorical sentences," transmitting their reasons for doing so to the Commission, which would then revise the Guidelines to incorporate the common practices of the judiciary. Breyer, 11 Fed. Sent. R. at 183, 185 (the original choices were to be "subject to revision in light of Guideline implementation experience"); *see also Booker*, 543 U.S. at 263.

Experience, however, has not measured up to these aspirations. In fact, the amendments have been notable for their relentless addition of factors that increase offense levels (the cumulative effect of the 696 amendments has been a "one-way upward ratchet" in sentencing),[16] and further restrict the ability of judges to consider, among other things, the history and characteristics of defendants, all without the benefit of studies that tie the increases to the purposes of sentencing.[17]

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[16] Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005). *See also, e.g., Fifteen Year Report* (Sentencing Commission) at 137-38 (discussing the negative impact of "factor creep" on the Commission's efforts to tie offense levels to offense seriousness); Jeffrey S. Parker (Former Deputy Chief Counsel to the Commission) & Michael K. Block (Former Commissioner), *The Limits of Federal Sentencing Policy; Or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001, 1019 (2001) (noting that the Commission has lapsed into enacting "gratuitous increases in punishment levels that ha[ve] no basis in either principle or practice, and instead [are] essentially political decisions reflecting responses to interest group pressures"); *id.* at 1033-34. Of the nearly 700 amemdments to the Guidelines (USSG App. C (2006)), only a handful have operated to decrease the length of some sentences. *See* Amy Baron-Evans, *The Continuing Struggle for Just, Effective, and Constitutional Sentencing After* United States v. Booker*: Why and How the Guidelines Do Not Comply with § 3553(a)*, 30 Champion 32 at n.39 (2006).

[17] *See* Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* at 56 (1998) ("Nowhere in the forest of directives that the Commission has promulgated over the last decade can

(*footnote continued on next page*)

Even criminal history—the single "offender" characteristic accounted for in the Guidelines—does not produce results that can be presumed to reflect the purposes of sentencing or other sentencing factors. Due to "pressing congressional deadlines," the Commission was unable to validate its criminal history measure with its studies. U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* ("*Measuring Recidivism Report*") at 1 (2004), *available at* http://www.ussc.gov/publicat/recidivism_general.pdf.

The Commission's analysis, which tested these premises seventeen years later, demonstrates quite compellingly that many of the offender characteristics the Commission has ruled off-limits—age, educational level, employment status, and so on—are indeed strong predictors of recidivism. *See Measuring Recidivism Report* at 16 ("Investigations using the recidivism data suggest that there are several legally permissible offender characteristics which, if incorporated into the criminal history computation, are likely to improve predictive power.").[18] Yet the ranges computed under the Guidelines do not account for any of these offender characteristics.[19] In

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one find a discussion of the rationale for the particular approaches or definitions adopted. . .; nor can one find any efforts to justify the particular weights it has elected to assign to various sentencing factors.").

[18] For example, the Commission found that recidivism rates are strongly correlated to age (35.5% for offenders under 21 versus 9.5% for offenders over 50), educational level (31.4% for offenders with less than a high school education versus 8.8% for offenders with a college degree), and employment status (32.4% for offenders who were not steadily employed in the year before their arrest versus 19.6% for offenders who were steadily employed during this period). *Id.* at 12-14.

[19] The problem is magnified by the Commission's initial decision to deviate upward from the "historical averages" for a particular category of defendants—those who had previously received probationary sentences for "certain economic crimes." USSG ch. 1, pt. A(4)(d) (1987)—notwithstanding Congress's directive that the Guidelines "reflect the gen-

(*footnote continued on next page*)

light of these factors, which are not considered in the Guidelines system, the district court in petitioner Gall's case properly considered that his rehabilitation, education, employment, and independent withdrawal from the conspiracy warranted a non-Guidelines sentence.

The development of the sentencing "common law" has also fallen short of expectations, largely because the Commission has consistently acted to remove the district judges' power to take *all* sentencing factors into account. In the early years of Guidelines sentencing, judges did depart from the Guidelines where the ranges did not adequately account for the individualized circumstances of the cases before them, such as military service, civic contributions, charitable activities, and other factors. Instead of taking such feedback into account, the Commission adopted several amendments that discouraged, or outright prohibited, such departures.[20] Thus, as one commentator recently noted, "the idea that feedback

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eral appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." *See* 28 U.S.C. § 994(j). Although the Commission's own findings from the recidivism data support the creation of a "first offender" criminal history category that would help carry out the directive in Section 994(j), *see* U.S. Sentencing Commission, *Recidivism and the "First Offender"* (2004), *available at* http://www.ussc.gov/publicat/Recidivism_First-Offender.pdf, the Guidelines still have not been amended to do so.

[20] *See* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 Stan. L. Rev. 277, 284 & n.33 (2005) (tracing the addition of § 5H1.12, prohibiting departures based on "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing," to *United States v. Floyd*, 956 F.2d 203 (9th Cir. 1991)); Judy Clarke, *The Sentencing Guidelines: What a Mess*, 55 Fed. Probation 45 (1991) (tracing the 1991 addition of § 5H1.11, which discourages the consideration of a defendant's military service, civic contributions, charitable activities, and "other similar prior good works," to *United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990), and *United States v. Pipich*, 688 F. Supp. 991 (D. Md. 1988)).

from front-line sentencing actors is an important component of the federal sentencing model has somehow been lost. Instead, . . . sentences outside the otherwise applicable guideline range have come to be viewed as illegitimate, even deviant." Frank O. Bowman, III, *Year of Jubilee . . . or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System after Booker*, 43 Hous. L. Rev. 279, 321 (2006).

E. The Rules Imposed By The Fourth And Eighth Circuits Are Inconsistent With The Standard Of Review Articulated By This Court In *Rita* And *Booker*

To be faithful to the remedy in *Booker*, and in recognition of the fact that the Guidelines have been—and are inherently—unable to incorporate Section 3553(a)'s sentencing purposes and factors, district courts must have the latitude to treat the Guidelines as truly advisory. This includes the power to make a reasoned determination that the Guidelines do not always reflect a proper balance of the statutory considerations, as well as the ability to conclude that for reasons apart from a "heartland" analysis the sentence should not substantially equate with that recommended by the Manual.

As demonstrated above, the Guidelines do not—and cannot—produce sentence ranges that take account of *each* factor and purpose a judge is required by law to consider. As this Court explained in *Rita*, emphasizing the differing roles of the Commission and the judge, this limitation is inherent in any system of Guidelines. In a sentencing proceeding, the factors a judge must consider are numerous, and the interplay of those factors with each other and with the purposes of sentencing is complex. Further complicating matters, many of those factors and purposes cannot be quantified or otherwise converted to a form in which they possess a common denominator. Thus, even if the factual input is accurate, a Guideline computation gives a judge nothing more than the ability to compare a limited number of factors in one case to the same categories of factors in other cases. That computation is in-

herently incapable of producing a benchmark (a presumptively accurate "answer") because such a computation cannot take into account much of the input necessary to the process.

As a result of these limitations, it is entirely appropriate for district judges to inquire whether a Guidelines sentence "fails properly to reflect § 3553(a) considerations[.]" *Rita*, slip op. at 12. Such an analysis encompasses whether "the Guidelines reflect an unsound judgment," or whether they "generally treat certain defendant characteristics in the proper way." *Id.* at 18 (identifying types of sentencing arguments that require judges to provide a more detailed statement of reasons for the sentence imposed). Because certain Section 3553(a) factors as applied to a particular case may be both "ordinary" and unaccounted for in the Guidelines, the rules applied by the Fourth and Eighth Circuits prevent judges from engaging in such an inquiry.

The rules employed in these two cases also fail to afford appropriate deference to district judges, who have an institutional advantage in evaluating the full mix of sentencing factors presented in a particular case. *See Rita*, slip op. at 11 (noting that *Booker* held that "'reasonableness' review merely asks whether the trial court abused its discretion"); *Koon v. United States*, 518 U.S. 81, 98 (1996) (recognizing the district courts' "institutional advantage over appellate courts" in determining how cases compare to one another). Ironically, if the government's version of reasonableness review prevails, judges will have less flexibility than when the guidelines were mandatory. *Koon*, 518 U.S. at 98 (justifying deference because district courts "see so many more Guidelines cases than appellate courts do"). For it was under the mandatory regime that this Court observed, "the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Id.*; *see also United States v. Diaz-Villafane*, 874 F.2d 43, 49-50 (1st Cir. 1989) ("District courts are in the front lines, sentencing flesh-and-blood defendants. The dynamics of the situation may be difficult to gauge from

the antiseptic nature of a sterile paper record. Therefore, appellate review must occur with full awareness of, and respect for, the trier's superior 'feel' for the case.")

In sum, when a district judge's analysis is rationally based on the Section 3553 factors, a sentence other than that recommended by the Guidelines is not unreasonable simply because it is based on a different weighing of those factors. *See Rita*, slip op. at 10 ("different judges (and others) can differ as to how best to reconcile the disparate ends of punishment"). And because judges operating under an advisory Guidelines system may properly conclude that non-extraordinary circumstances pertinent to one or more Section 3553(a) factors warrant a sentence that is materially different from that recommended under Section 3553(a)(4), such a conclusion is not a proper ground for reversal.

CONCLUSION

The judgments of the courts of appeals should be reversed and the cases remanded for proceedings consistent with this Court's rulings in *United States v. Booker* and *Rita v. United States*.

Respectfully submitted.

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(11)

No. 06-7949

In the Supreme Court of the United States

BRIAN MICHAEL GALL,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NEW YORK COUNCIL OF DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, when assessing upon appeal the "reasonableness" of a sentence under *United States v. Booker*, 543 U.S. 220 (2005), a circuit court should reverse a district court's reasoned decision to impose a sentence outside the United States Sentencing Guidelines if it concludes the case does not exhibit unique or extraordinary circumstances.

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STATEMENT OF INTEREST

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 200 lawyers (including many former federal prosecutors) whose principal area of practice is the defense of criminal cases in the federal courts of New York.[1] NYCDL's mission includes protecting and ensuring individual rights guaranteed by the U.S. Constitution by rule of law through education; supporting and advancing the criminal defense function by enhancing the quality of defense representation; taking positions on important defense issues; promoting study and research in the criminal justice system; and promoting the proper administration of criminal justice.

NYCDL offers the Court the perspective of very experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL's *amicus* briefs in *United States v. Booker*, 543 U.S. 220 (2005), and *Rita v. United States*, 127 S. Ct. 2456 (2007), were cited by the Court or concurring justices. NYCDL submitted a brief in *Claiborne v. United States*, 127 S. Ct. 2245 (2007), and has an interest in the standards applied on appeal for reviewing sentences that are outside the advisory-guidelines range. NYCDL also has an interest in promoting just and comprehensive sentencing policy that includes alternatives to incarceration. We believe that it is imperative to the protection of our clients' rights, and to the establishment of a more just sentencing system, that the courts of appeals afford sentences imposed outside the advisory-guidelines range and sentences of probation the same degree of deference as sentences of imprisonment within the guidelines range.

To assist this Court, NYCDL has updated its analysis

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[1] Petitioner has filed a general consent for amicus briefs in this case, and a letter of consent from Respondent has been submitted concurrently with this filing. No counsel for a party authored this brief in whole or in part, and no person other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. S. Ct. R. 37.6.

(submitted in *Rita* and *Claiborne*) of post-*Booker* reasonableness review cases in the Eighth Circuit. This analysis includes cases captured by the search terms described in the attached appendix ("App."),[2] from January 1, 2006 through June 30, 2007. The results show that proportionality review is applied unevenly by the courts of appeals, and particularly the Eighth Circuit. As a result, the vast majority of below-guidelines sentences—especially sentences that do not include incarceration—have been reversed as unreasonable, whereas courts have accorded undue deference to above-guidelines sentences that are substantially higher than what the guidelines advise. These findings cannot be reconciled with the Sentencing Reform Act ("SRA") or this Court's decisions in *Booker* and *Rita*.

SUMMARY OF ARGUMENT

Congress has instructed district courts to "impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing set forth in the SRA. 18 U.S.C. § 3553(a)(2). District courts must "consider" seven specified factors, one of which is the guidelines range. Although a court of appeals may presume a guidelines sentence to be "reasonable," it may not presume a non-guidelines sentence to be unreasonable. *Rita*, 127 S. Ct. at 2467. Reasonableness review, this Court explained, "merely asks whether the trial court abused its discretion." *Id.* at 2465. "[A]ppellate courts must review sentences individually and deferentially whether they are inside the Guidelines range ... or outside that range," *id.* at 2474 (Stevens, J., concurring), and "appellate judges must still *always* defer to the sentencing judge's individualized sentencing determination," *id.* at 2472 (Stevens, J., concurring) (emphasis added).

First, proportionality review, particularly as applied by the Eighth Circuit, is not faithful to the principles articulated by this Court in *Booker* and *Rita*. The problems

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[2] NYCDL's "Summary of Findings," that was submitted in *Rita* and *Claiborne*, is reproduced in the attached appendix at 2a-8a.

with proportionality review are manifold: its precise meaning, reach and application are hard to define, and it risks affording the guidelines a centrality that belies their present status as "effectively advisory." *See, e.g.*, Tr. of Oral Argument at 34-35, *United States v. Claiborne*, 127 S. Ct. 2245 (2007) (No. 06-5618) (Justice Breyer: "[Proportionality] sounds nice, as if you're saying something, but proportional to what? ... One problem, of course, is that the chart in the guidelines is written on a logarithmic scale .... It doesn't actually work, I don't think, proportionality review, because it's so hard to say what's proportional."). And, contrary to this Court's instructions, the Eighth Circuit and other courts of appeals have applied proportionality review in an uneven manner reflecting a bias in favor of high, above-guidelines sentences, and against below-guidelines sentences, especially probation.

Second, proportionality review has created a capricious and inappropriate judicially-invented line between incarceration and sentences to probation. When the guidelines recommend some imprisonment, and a district court imposes a sentence of probation, the courts of appeals have considered the sentence a "100% variance" from the advisory-guidelines range, and thus essentially treat probation as *zero* punishment. Consequently, the courts of appeals have required probation sentences to be justified by the most extraordinary circumstances. The result is that in a number of cases appellate courts improperly substitute their judgment for that of the district court, ignore the district court's assessment that probation is the appropriate sentence, and effectively mandate incarceration.

By characterizing any probation sentence as a 100% variance, the courts of appeals have severely curtailed probation as a viable sentencing option whenever the advisory guidelines recommend any term of incarceration. This circuit policy toward probation sentences undermines the statutory framework set forth in the SRA. By designating probation as an independent sentencing option under 18 U.S.C. § 3551(b), Congress made clear that there is

a distinct place and purpose for probation and rejected the notion that a sentence of probation is not punishment. Congress provided district courts additional guidance on the permissible use of probation by carving out the offenses for which probation is available. 18 U.S.C. § 3561. Moreover, Congress expressly identified rehabilitation as one of the four purposes of sentencing, § 3553(a)(2)(D), and emphasized the general "inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating" defendants. *See* 28 U.S.C. § 994(k). And, at sentencing, Congress directed sentencing courts to "consider" "the kinds of sentences available." 18 U.S.C. § 3553(a)(3).

This statutory structure simply reflects that probation and other "kinds of sentences" have been essential to the federal criminal justice system since at least the 1830s. The availability and evolution of probation reflects society's judgment that in some cases the benefits to the offender and to the public will be greater if the defendant is not incarcerated. Balancing the sometimes competing sentencing purposes and considering the "kinds of sentences available" are tasks uniquely suited for district judges who encounter first-hand the "'multifarious, fleeting, special, narrow facts'" about individual offenses and offenders. *Koon v. United States*, 518 U.S. 81, 99 (1996) (citation omitted). The courts of appeals' second-guessing of district courts' attempts to tailor the punishment to the offender, and their treatment of probation sentences as 100% variances and non-punishment contravene the SRA and the sound sentencing policies that animate it.

Third, the importance of sentencing alternatives cannot be overstated for some offenders. There is substantial evidence that probation sentences for first-time non-violent offenders, particularly the least culpable drug offenders and white-collar defendants, can be sufficient but not greater than necessary to comply with the statutory purposes of sentencing. To fulfill congressional sentencing mandates, district courts must be afforded the discretion, pursuant to *Booker* and *Rita*, to consider "the kinds of sentences

available," including probation, when in the judge's reasoned opinion, that is the appropriate sentence. Proportionality review prevents this and flouts *Booker* and *Rita*.

ARGUMENT

I. PROPORTIONALITY REVIEW HAS BEEN APPLIED INCONSISTENTLY, TO THE DETRIMENT OF DEFENDANTS RECEIVING PROBATIONARY SENTENCES

In its *Claiborne* brief, NYCDL argued that proportionality review is inconsistent with § 3553(a) and this Court's decisions. *See* Brief of New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner, *Claiborne v. United States*, 127 S. Ct. 2245 (2006) (No. 06-5618). And in this case, Gall (and other *amici*) do an excellent job explaining why. As applied, proportionality review puts undue weight on the guidelines even though they are merely advisory, and undermines the sentencing standards set forth in *Booker* and *Rita*. The way the Eighth Circuit in particular has applied proportionality review impedes district courts' ability to vary from the guidelines consistent with their discretion, which *Booker* and *Rita* recognize is essential to avoid the Sixth Amendment difficulties created by mandatory guidelines.

NYCDL's previous study of reasonableness review outcomes demonstrated that the courts of appeals were uniformly affirming all within-guidelines sentences. App. 2a-8a.[3] NYCDL's study also revealed that in practice sentences *outside* the guidelines range are treated differently on appeal depending upon whether they exceed the applicable range or are below that range. As Justice Scalia has stated, "reasonableness review should not function as a one-way ratchet." *Rita*, 127 S. Ct. at 2477 n.2 However, even though the circuit courts purport to treat all

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[3] As Justice Scalia recognized in his *Rita* opinion, NYCDL's findings reveal that even circuits claiming not to apply a presumption of reasonableness are just as likely as those that do to affirm all within-guidelines sentences. 127 S. Ct. at 2478 n.3 (Scalia, J., concurring).

non-guidelines sentences the same way,[4] in practice they do apply a "one-way ratchet." The courts have shown extraordinary deference to above-guidelines sentences, affirming even sentences requiring defendants to serve double or triple the time suggested by the guidelines. But these same courts of appeals have been hostile to below-guidelines sentences, reversing sentences that shaved only a few months off the bottom of the guidelines range. NYCDL's data revealed that through November 16, 2006, the courts of appeals had reversed only 7 of 154 above-guidelines sentences as unduly harsh. App. at 2a. In stark contrast, however, the courts had declared unreasonably lenient 60 of 71 below-guidelines sentences. *Id.*

The Eighth Circuit pattern was particularly uneven. For the 18 months from January 1, 2006 through June 30, 2007 (updated from the initial study), NYCDL uncovered 38 above-guidelines sentences reviewed by the Eighth Circuit. App. 1a. The court affirmed 36 of these sentences, finding only 2 sentences unreasonably harsh. *Id.* By contrast, the Eighth Circuit reversed 47 of 50 below-guidelines sentences appealed by the government, finding them unreasonably lenient. *Id.*

The Eighth Circuit's government bias impacts its assessment of the extent of variances as well: the court has affirmed 25 sentences that imposed prison terms at least 50% greater than the bottom of the guidelines range, including 14 sentences in which the bottom was *more than doubled*.[5] In at least 11 cases, the Eighth Circuit affirmed

[4] *See, e.g., United States v. Jones*, 460 F.3d 191, 196 (2d Cir. 2006) ("If we are to be deferential when the Government persuades a district judge to render a non-Guidelines sentence somewhat above the Guidelines range, we must be similarly deferential when a defendant persuades a district judge to render a non-Guidelines sentence somewhat below the Guidelines range. Obviously, the discretion that *Booker* accords sentencing judges to impose non-Guidelines sentences cannot be an escalator that only goes up."); *United States v. Anderson*, 2007 WL 1112666, at *2 (5th Cir. 2007) (same).

[5] *See United States v. Lyons*, 450 F.3d 834 (8th Cir. 2006) (from 70 to 180 months); *United States v. Mallory*, 192 Fed. Appx. 586 (8th Cir. 2006)

sentences that added 5 years or more of imprisonment to the bottom of the guidelines range.[6] On the other hand, that court has declared unreasonable nearly every downward variance appealed by the government, requiring, but not finding, extraordinary circumstances to justify the district court's decision. App. 1a.

The Eighth Circuit has even employed the same factor—criminal history—inconsistently. It has approved

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(from 27 to 60 months); *United States v. Maurstad*, 454 F.3d 787 (8th Cir. 2006) (from 41 to 120 months); *United States v. Meyer*, 452 F.3d 998 (8th Cir. 2006) (from 180 to 270 months); *United States v. Porter*, 439 F.3d 845 (8th Cir. 2006) (from 57 to 120 months); *United States v. Sitting Bear*, 436 F.3d 929 (8th Cir. 2006) (from 151 to 228 months); *United States v. Marshall*, 436 F.3d 929 (8th Cir. 2006) (from 151 to 228 months); *United States v. Larrabee*, 436 F.3d 890 (8th Cir. 2006) (from 188 to 363 months); *United States v. Nelson*, 453 F.3d 1004 (8th Cir. 2006) (from 4 to 24 months); *United States v. Chase*, 451 F.3d 474 (8th Cir. 2006) (from 57 to 96 months); *United States v. Mack*, 452 F.3d 744 (8th Cir. 2006) (from 30 to 51 months); *United States v. Hacker*, 450 F.3d 808 (8th Cir. 2006) (from 92 to 180 months); *United States v. Porchia*, 180 Fed. Appx. 598 (8th Cir. 2006) (from 6 to 24 months); *United States v. Larison*, 432 F.3d 921 (8th Cir. 2006) (from 5 to 60 months); *United States v. Hawk Wing*, 433 F.3d 622 (8th Cir. 2006) (from 6 to 18 months); *United States v. Herman*, 206 Fed. Appx. 616 (8th Cir. 2006) (from 30 to 45 months); *United States v. Howard*, 2006 WL 3333024 (8th Cir. 2006) (from 77 to 120 months); *United States v. Nading*, 2007 WL 1544424 (8th Cir. 2007) (from 7 to 24 months); *United States v. Jetter*, 2007 WL 1120420 (8th Cir. 2007) (from 5 to 54 months); *United States v. Miller*, 479 F.3d 984 (8th Cir. 2007) (from 18 to 60 months); *United States v. Baker*, -- F.3d --, 2007 WL 1757825 (8th Cir. 2007) (from 4 to 48 months); *United States v. Red Feather*, 479 F.3d 584 (8th Cir. 2007) (from 5 to 30 months); *United States v. Gnavi*, 474 F.3d 532 (8th Cir. 2007) (from 63 to 120 months); *United States v. Tjaden*, 473 F.3d 877 (8th Cir. 2007) (from 41 to 72 months); *United States v. D'Andrea*, 473 F.3d 859 (8th Cir. 2007) (from 78 to 180 months).

[6] *Lyons*, 450 F.3d 834 (increase of more than 9 years); *Maurstad*, 454 F.3d 787 (increase of 6.5 years); *Meyer*, 452 F.3d 998 (increase of 7.5 years); *Porter*, 439 F.3d 845 (increase of 5.25 years); *United States v. Hawkman*, 438 F.3d 879 (8th Cir. 2006) (increase of 5.5 years); *Sitting Bear*, 436 F.3d 929 (increase of 6.4 years); *Marshall*, 436 F.3d 929 (increase of 6.4 years); *Larrabee*, 436 F.3d 890 (increase of 14.5 years); *Hacker*, 450 F.3d 808 (increase of 7.3 years); *United States v. Garnette*, 474 F.3d 1057 (8th Cir. 2007) (increase of 6.25 years); *D'Andrea*, 473 F.3d 859 (increase of 8.5 years).

substantial *upward* variances in a large number of cases where the district court found that the guidelines did not adequately capture the severity of the offender's criminal history. At the same time, the court has held unreasonable a significant number of below-guidelines sentences in which the district court concluded that the guidelines overstated the offender's criminal history.[7] Though the government might assert that proportionality review can protect defendants' interests and enhances sentencing uniformity, the actual results of appellate review tell a very different story. The Eighth Circuit and other courts of appeals plainly invoke proportionality review to cast a disparaging eye upon below-guidelines sentences even while they afford district judges almost unlimited discretion to increase sentences based on judicial fact-finding to a level often far beyond what even the guidelines recommend. To ensure principled and practical sentencing doctrines that effectuate congressional statutory and policy goals, this Court should reject proportionality review and re-emphasize that the abuse of discretion standard of reasonableness review applies across the board to below-guidelines sentences including sentences of probation.

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[7] *Compare Lyons*, 450 F.3d 834 (affirming upward variance from 70 to 180 months based on criminal history and likelihood of recidivism); *Mallory*, 192 Fed. Appx. 586 (same; from 27 to 60 months); *Maurstad*, 454 F.3d 787 (same; from 41 to 120 months); *Porter*, 439 F.3d 845 (same; from 57 to 120 months); *Chase*, 451 F.3d 474 (same; from 57 to 96 months); *Hacker*, 450 F.3d 808 (same; from 92 to 180 months); *Porchia*, 180 Fed. Appx. 596 (same; from 6 to 24 months); *Hawk Wing*, 433 F.3d 622 (same; from 6 to 18 months), *with United States v. McDonald*, 461 F.3d 948 (8th Cir. 2006) (vacating below-guidelines sentence imposed by district court based on low likelihood of recidivism); *United States v. Ture*, 450 F.3d 352 (8th Cir. 2006) (vacating below-guidelines sentence for first-time offender); *United States v. Gall*, 446 F.3d 884 (8th Cir. 2006)(criminal history); *United States v. Feemster*, 435 F.3d 881 (8th Cir. 2006, (age and criminal history); *United States v. Lee*, 454 F.3d 836 (8th Cir. 2006) (criminal history); *United States v. Bradford*, 447 F.3d 1026 (8th Cir. 2006) (age and criminal history); *United States v. Brinton*, 436 F.3d 871 (8th Cir. 2006) (criminal history).

II. TREATING SENTENCES OF PROBATION AS "100% VARIANCES" IS INCONSISTENT WITH THE SENTENCING REFORM ACT AND IMPROPERLY DISCOURAGES DISTRICT COURTS FROM IMPOSING SENTENCES OF PROBATION IN APPROPRIATE CASES

Booker expressly holds that the "numerous factors" Congress set forth in § 3553(a) are to "guide appellate courts ... in determining whether a sentence is unreasonable." 543 U.S. at 261. However, the Eighth Circuit and other courts of appeals approach what should be a flexible standard of "reasonableness" in an artificially mechanical way, by calculating a percentage by which a sentence varies from the advisory-guidelines range and then purporting to assess the persuasiveness of the district court's reasons against the extent of the variance. This rigid mathematical construct treats sentences of probation as 100% variances from the guidelines. Courts of appeals regard probation sentences essentially as *zero* punishment and as if they are categorically less stringent than any term of incarceration, no matter how brief. That is contrary to Congress's understanding of punishments as expressed in the SRA, is misguided as a matter of law, creates an artificial impediment to effective sentencing policy, and is simply not the courts of appeals' decision to make.

A. Congress Has Provided That Probation Is A Necessary And Effective Sanction In Any Comprehensive Sentencing System

Congress has never suggested that a sentence of probation is a free pass. Both historic sentencing practices and modern sentencing reforms document probation's status as an important type of punishment that must be an integral part of any comprehensive federal sentencing scheme.

In this case, the district judge's detailed written opinion supporting his sentencing determinations document the impact and virtues of probation as a punishment for certain offenders. The district judge fully understood and thoughtfully explained why three years' probation was a

stern sentence that effectuated congressional goals of punishment: "'[P]robation is not an act of leniency. Probation is a substantial restriction of freedom, it is not forgiveness, and it is not an endorsement of the offense.' The Defendant will have to comply with strict reporting conditions along with a three-year regime of alcohol and drug testing. He will not be able to change or make decisions about significant circumstances in his life, such as where to live or work, which are prized liberty interests, without first seeking authorization from his Probation Officer or ... the Court. Of course, the Defendant always faces the harsh consequences that await if he violates the conditions of his probationary term." *United States v. Gall*, 374 F. Supp. 2d 758, 763 (S.D. Iowa 2005) (citation omitted).

Probation, rooted in the common law of England, has been a fixture in the United States since the 1830s. *See* Howard Abadinsky, *Probation and Parole: Theory and Practice* 96 (9th ed. 2006). The concept developed from a deeply-rooted societal notion that punitive alternatives to incarceration may produce greater benefits to society even though incarceration may be appropriate in the ordinary case. "The basis of the probation system is, ... in those cases where an examination of the facts of the case warrant sufficient hope for improvement, to deal with the individual in such a way as to make the best of that hope, on the ground that he is more likely to be a future menace to society if he is [incarcerated] than if he is given an opportunity under supervision to improve ...." Frank W. Grinnell, *The Common Law History of Probation*, 32 J. Crim. L. & Criminology 15, 32 (1941); *see also United States v. Murray*, 275 U.S. 347, 358 (1928) ("Probation is the attempted saving of a man who has taken one wrong step, and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence"). Probation evolved throughout the 1800s as judges and state legislatures increasingly perceived it as an appropriate sentence for certain offenders. Abadinsky, *supra*, at 96-98. In *Ex parte United States*, however, this

Court held that federal judges lack authority to impose probationary sentences absent congressional authorization. 242 U.S. 27, 52 (1916). Congress signaled its support for probation soon thereafter, authorizing courts to place a convicted offender under the supervision of a probation officer in suspension of a jail sentence. *See* 18 U.S.C. §§ 3651-3656 (1925), *replaced by* 18 U.S.C. §§ 3551-3556.

By 1956, every state and the federal government authorized probationary sentences. Abadinsky, *supra*, at 98. Before the SRA was enacted, district judges had "wide discretion to decide whether the offender should be incarcerated and for how long, whether he should be fined and how much, and whether some lesser restraint, such as probation, should be imposed instead of imprisonment or fine." *Mistretta v. United States*, 488 U.S. 361, 363 (1989); *see also* Frank O. Bowman, III, *Fear of Law: Thoughts on* Fear of Judging *and the State of the Federal Sentencing Guidelines*, 44 St. Louis U. L.J. 299, 312-13 (2000).

Probation continues to be a legitimate and important punishment in the federal criminal justice system and was retained in the SRA as an integral part of a comprehensive federal sentencing system. Congress expressly designated probation as an independent and legitimate form of punishment and sentencing option for district courts to consider. 18 U.S.C. § 3551(b); *see also* Roger W. Haines et al., *Federal Sentencing Guidelines Handbook* § 6A1.1 (2007). Congress provided further direction by specifying the circumstances in which a sentence of probation may be imposed. 18 U.S.C. § 3561. In addition, Congress identified "rehabilitation" as one of the four statutory purposes of sentencing, on equal footing with punishment, deterrence, and incapacitation. 18 U.S.C. § 3553(a)(2); *see also* S. Rep. No. 98-225, at 77 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3260 ("In setting out the four purposes of sentencing, the Committee has deliberately not shown a preference for one purpose of sentencing over another in the belief that *different purposes may play greater or lesser roles in sentencing for different types of offenses committed by*

different types of defendants.") (emphasis added). Moreover, two of the seven statutory factors Congress instructed district judges to "consider" at sentencing are "the need for the sentence imposed" to achieve the purposes of sentencing and "the kinds of sentences available." 18 U.S.C. § 3553(a)(2)-(3). And the SRA states that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a).

The SRA plainly permits judges to consider a variety of sentencing options (including probation) in order to craft a sentence appropriate for the particular offender and circumstances. And Congress directed the Commission to "insure that the guidelines reflect the *general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender* who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j) (emphasis added). (Disappointingly, the Commission has never promulgated a specific guideline to effectuate this congressional mandate; this reality makes it that much more important for district judges to have broad authority to impose a sentence other than imprisonment for first offenders even in cases when the guidelines suggest some term of imprisonment.) The statutory directive is clear: the SRA "requires judges to take account of the Guidelines *together with other sentencing goals*," and "to impose sentences that reflect" the statutory purposes of sentencing, including rehabilitation. *Booker*, 543 U.S. at 260; *accord* Richard S. Frase, *Punishment Purposes*, 58 Stan. L. Rev. 67, 82 (2005) (Section 3553(a) "clearly shows that Congress preferred a hybrid theory of sentencing purposes").

The legislative history confirms that Congress intended for probation to play an important role in sentencing. The Senate Report criticized sentencing policies that would "draw an artificial line between imprisonment and probation," and that would "assume[] that a term of imprisonment, no matter how brief, is necessarily a more stringent sentence than a term of probation with restrictive

conditions and a heavy fine." S. Rep. No. 98-225, at 55. "*Such an assumption,*" Congress forcefully concluded, "*would be a roadblock to the development of sensible comprehensive sentencing policy,*" that the SRA seeks to establish. *Id.* (emphasis added).

Congress also directed the Commission to assure that the guidelines, "in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." 28 U.S.C. § 994(e). But the Senate Report explained that the purpose of § 994(e) was *not* to exclude these factors from district judges' consideration for all purposes, but rather "to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties." S. Rep. No. 98-225, at 175. Accordingly, the Senate Report provides that these factors "may play other roles in the sentencing decision; they may, in an appropriate case, *call for the use of a term of probation instead of imprisonment* if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community." *Id.* at 174-75 (emphasis added). The Report also points out that "the need for an educational program might call for a sentence of probation if such a sentence were otherwise adequate to meet the purposes of sentencing *even in a case in which the guidelines might otherwise call for a short term of imprisonment.*" *Id.* at 172-73; *see also id.* (discussing how mental or emotional conditions and drug dependence might be considered in determining that a sentence other than imprisonment is appropriate). In sum, the SRA clearly permits—in fact, *requires*—district judges to consider whether probation is an appropriate sentence and gives district courts broad discretion to impose that sentence free from undue second-guessing by appellate judges.

B. Treating All Probation Sentences As 100% Variances Unlawfully Permits Courts Of

Appeals To Substitute Their Judgment For That Of District Judges

NYCDL reviewed a substantial number of appeals of probation sentences, the vast majority of which were reversed as unreasonably lenient. Of 29 appeals of sentences of probation reviewed by NYCDL, the courts of appeals reversed 23 as unreasonably low, and affirmed only 6 sentences.[8] The Eighth Circuit's decisions provide a

[8] *See United States v. Hawkins*, 2007 WL 1241538 (2d Cir. 2007) (where guidelines range was 12-18 months, affirming sentence of 30 months' probation); *United States v. Anderson*, 2007 WL 1112666 (5th Cir. 2007) (where guidelines range was 30-37 months, affirming sentence of 36 months' probation and 8 days time-served); *United States v. Husein*, 478 F.3d 318 (6th Cir. 2007) (where guidelines range was 37-46 months, affirming sentence of 36 months' supervised release and 1 day time-served, including 270 days home confinement); *United States v. Fuson*, 215 Fed. Appx. 468 (6th Cir. 2007) (where guidelines range was 24-30 months, affirming sentence of 60 months' probation, including 6 months' home confinement); *United States v. Menyweather*, 447 F.3d 627 (9th Cir. 2006) (where guidelines range was 21-27 months, affirming sentence of 60 months' probation and 40 days weekend jail time). The courts of appeals vacated as unreasonably lenient the other probation appeals uncovered by NYCDL. *See United States v. Rattoballi*, 452 F.3d 127 (2d Cir. 2006) (where guidelines range was 27-33 months, reversing sentence of 60 months' probation); *United States v. Canova*, 485 F.3d 674 (2d Cir. 2007) (where guidelines range was 57-71 months, reversing sentence of 12 months' probation); *United States v. Kononchuk*, 485 F.3d 199 (3d Cir. 2007) (where guidelines range was 18-24 months, reversing sentence of 60 months' probation); *United States v. Pyles*, 482 F.3d 282 (4th Cir. 2007) (where guidelines range was 63-78 months, reversing sentence of 60 months' probation); *United States v. Hampton*, 441 F.3d 284 (4th Cir. 2006) (where guidelines range was 57-71 months, reversing sentence of 36 months' probation); *United States v. Goldsmith*, 192 Fed. Appx. 261 (5th Cir. 2006) (where guidelines range was 27-33 months, reversing sentence of 36 months' probation, including 12 months' home confinement and three days time served); *United States v. Duhon*, 440 F.3d 711 (5th Cir. 2006) (where guidelines range was 15-21 months, reversing sentence of 60 months' probation, including 6 months' home confinement); *United States v. Davis*, 458 F.3d 491 (6th Cir. 2006) (where guidelines range was 30-37 months, reversing sentence of 36 months' supervised release); *United States v. Wallace*, 458 F.3d 606 (7th Cir. 2006) (where guidelines range was 24-30 months, reversing sentence of 36 months' probation); *United States v. Hildreth*, 485 F.3d 1120 (10th Cir. 2007) (where guidelines range was 27-33 months, reversing sentence of 36 months' probation); *United*

typical example: the court below has reversed 10 of 11 appeals of probation sentences as unreasonably lenient.[9] And in at least two of those cases, it mandated that the district court impose a sentence of imprisonment despite the

States v. Livesay, 146 Fed. Appx. 403 (11th Cir. 2005) (where guidelines range was 78-97 months, reversing sentence of 60 months' probation); *United States v. McVay*, 447 F.3d 1348 (11th Cir. 2006) (where guidelines range was 87-101 months, reversing sentence of 60 months' probation); *United States v. Martin*, 455 F.3d 1227 (11th Cir. 2006) (where guidelines range was 108-135 months, reversing sentence of 24 months' probation). For Eighth Circuit cases, *see* n.9.

[9] *See United States v. Miller*, 484 F.3d 964, 967 (8th Cir. 2007) (vacating sentence of 36 months' probation with 12 months' in-home detention and 8.5 months' pre-trial detention, because "[o]n its face the probationary sentence imposed constituted a 100% downward variance from the Guidelines range"); *Gall*, 446 F.3d 884 ("this amounts to a 100% downward variance, as Gall will not serve any prison time"); *United States v. Likens*, 464 F.3d 823 (8th Cir. 2006) (treating sentence as 100% variance and mandating incarceration); *United States v. Givens*, 443 F.3d 642, 643 (8th Cir. 2006) (where guidelines range was 24-30 months and offense resulted in a loss of greater than $400,000 but less than $1,000,000, holding that sentence of 60 months' supervised release, 12 months' house arrest, eighty hours community service, and restitution of $1.2 million was "wholly unreasonable"); *Ture*, 450 F.3d at 357 (where guidelines range was 12-18 months, reversing sentence of 24 months' probation, stating that probation "amounts to a 100% variance from the Guidelines range," and mandating incarceration); *United States v. Gentile*, 473 F.3d 888, 894 (8th Cir. 2007) (where guidelines range was 37-46 months, reversing sentence of 36 months' probation and 1 day time-served and stating that "[a]lthough there may be circumstances in which probation is appropriate even where the guidelines advise incarceration, this is not such a case"); *United States v. Pool*, 474 F.3d 1127 (8th Cir. 2007) (where guidelines range was 33-41 months, reversing sentence of 60 months' probation); *United States v. Robinson*, 454 F.3d 839 (8th Cir. 2006) (where guidelines range was 63-78 months, reversing sentence of 60 months' probation); *United States v. Medearis*, 451 F.3d 918 (8th Cir. 2006) (where guidelines range was 46-57 months, reversing sentence of "only five years of probation"); *United States v. Rogers*, 400 F.3d 640 (8th Cir. 2005) (where guidelines range was 51-63 months, reversing sentence of 60 months' probation); *United States v. Wadena*, 470 F.3d 735 (8th Cir. 2006) (where guidelines range was 18-24 months, affirming sentence of 60 months' probation where defendant was 67 years old, suffered from several chronic health conditions and underwent 3 hours of dialysis per day and was the sole caretaker for an adopted adult with fetal alcohol syndrome).

district court's belief that a sentence of probation would better serve Congress's purposes of sentencing.

The problems with proportionality review are particularly acute when probation is the sentence because of the way courts "compute" the variance. Courts treat sentences of probation (whenever the guidelines recommend incarceration) as sentences of *zero* punishment and 100% variances from the advisory guidelines range. *See, e.g.*, *United States v. Gall*, 446 F.3d 884, 889 (8th Cir. 2006) ("probation ... amounts to a 100% downward variance"); *United States v. Pyles*, 482 F.3d 282, 289 (4th Cir. 2007) ("a 100% decrease"). This crude approach is inconsistent with Congress's will and fails to accord appropriate deference to district court judgments about how best to effectuate Congress's policies in particular cases.

First, treating sentences of probation as *zero* punishment cannot be squared with the SRA or congressional intent. It assumes that any sentence of incarceration is harsher—and furthers the guidelines' four sentencing purposes better—than a sentence of probation with restrictions on a defendant's liberty. But if that were true, Congress surely would not have authorized probation as a stand-alone sentence. The Senate Report demonstrates that Congress recognized that sometimes probation can be harsher than a short period of incarceration. The Report shows that Congress wanted to avoid "draw[ing] an artificial line between imprisonment and probation" by rejecting a "sentencing policy that assumes that a term of imprisonment, no matter how brief, is necessarily a more stringent sentence than a term of probation with restrictive conditions and a heavy fine." Congress also expressly authorized sentencing courts to impose onerous conditions of probation, such as home confinement, which can make probation sentences harsher than brief sentences of imprisonment. *See, e.g.*, 18 U.S.C. § 3563(b)(19); *see also United States v. Likens*, 464 F.3d 823, 827 (8th Cir. 2006) (Bright, J., dissenting) ("The majority's opinion reads as if ... probation essentially would leave him unpunished. This

is hardly the case; three years' probation would still serve to significantly curtail Mr. Likens's mobility, activities, drug-use, and personal freedom while sparing the citizens of this country the expense of incarcerating a person in poor health who is no danger to society."). As the Senate Report explains, assuming that imprisonment is always a tougher sentence "would be a roadblock to the development of sensible comprehensive sentencing policy." S. Rep. No. 98-225, at 55. Characterizing probation as a 100% downward variance, as the courts of appeals have done, draws the artificial line Congress tried to avoid, and erects precisely the roadblock to sensible sentencing that Congress rejected.

As many courts and judges have long recognized, "[i]ncarceration is not the only, and indeed not even always the best, means of punishing or deterring crime." *Likens*, 464 F.3d at 827 (Bright, J., dissenting); *see also United States v. Blake*, 89 F. Supp. 2d 328, 344 (E.D.N.Y. 2000) ("Instead of reforming its inmates, too often prison converts them into 'hardened enem[ies] of society.'") (citation omitted) (alteration in original). Nevertheless, courts of appeals have described sentences of probation as "a get-out-of-jail-free card," *Pyles*, 482 F.3d at 292, and "setting [the defendant] free," *United States v. Hawkins*, 2007 WL 1241538, at *3 (2d Cir. 2007) (Wallace, J., dissenting).[10] The courts of appeals refuse to accept that probation sentences

[10] Notably, in cases where the district court sentences an offender to probation, the government often "essentially argues ... that any variance from a Guidelines sentencing range of imprisonment down to probation is unreasonable." *Wadena*, 470 F.3d at 738. However, the President has recently articulated a much different and much sounder view of sentencing realities. In commuting entirely the prison sentence of I. Lewis Libby, President Bush stated that the sentence set at the bottom of the calculated guidelines range was "excessive." Defending his commutation, President Bush indicated that the remaining sentence of two-years' probation left in place a "harsh punishment" with "consequences ... long-lasting." *See* Statement of President George W. Bush (July 2, 2007); *cf.* President George W. Bush, State of the Union Address (2004) (stressing the importance of showing compassion and providing job training and placement services to convicted offenders because "America is the land of second chance").

can be reasonable and have failed to appreciate that, by providing probation as an "available" sentence under 18 U.S.C. §§ 3551 and 3561, and requiring district courts to consider "the kinds of sentences available," 18 U.S.C. § 3553(a)(3), Congress conferred on district courts ample discretion to sentence defendants to probation in a variety of cases.

Second, whether probation is more appropriate than incarceration for a particular defendant is a decision best left to the district court. To reach that decision, "the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Koon*, 518 U.S. at 98. Unlike Congress, which is responsible for establishing sentencing policy, and district courts, which "have an institutional advantage over appellate courts in making [sentencing] determinations, especially as they see so many more Guidelines cases than appellate courts do," *id.*, appellate courts have neither the authority nor the expertise to make refined assessments about the uniqueness of a particular case and whether probation is appropriate. *See also id.* at 99 (noting district courts' "'special competence ... about the ordinariness or unusualness of a particular case'") (citation omitted). A sentence that emphasizes the defendant's potential for rehabilitation is arguably in tension with a pure retributive focus. But any judicially created sentencing doctrines that place undue emphasis on retribution is too blunt an instrument to accommodate the full array of Congress's goals set forth in the SRA. How to accommodate Congress's sometimes competing punishment goals—none of which is formally accorded more weight than any other in the SRA's text—for a particular defendant is a decision best left to the district court. *Rita*, 127 S. Ct. at 2464 ("[D]ifferent judges (and others) can differ as to how best to reconcile the disparate ends of punishment."); *Medearis*, 451 F.3d at 922 (Lay, J., dissenting) ("Sentencing courts have the unique ability to appraise the evidence and personally assess a defendant.").

Thus, in a particular case, a judge may determine that probation is more effective in satisfying Congress's sentencing goals, including deterrence, than retribution for its own sake.

The Eighth Circuit's decision in *Likens* is a prime example of appellate overreaching. The district court calculated a guidelines range of 15-21 months' imprisonment, and after a reasoned analysis, imposed a sentence of three years' probation. The district judge "noted that no violence was involved in the offense, that Likens had been married for thirty-one years and had a supportive family, and that he was suffering from diabetes, heart disease, and obvious addictions to alcohol and drugs." *United States v. Likens*, 487 F. Supp. 2d 1046, 1406 (S.D. Iowa 2007). The judge concluded that Likens was not a threat to society and "that his conduct was entirely linked to his substance abuse and mental health problems." *Id.* at 1046-47. He imposed conditions requiring Likens to participate in substance abuse treatment, mental health treatment and counseling, and barred Likens from "patronizing businesses where more than fifty percent of the revenue is derived from the sale of alcohol." *Id.* at 1047. The district court also explained that a sentence of probation would meet the purposes of sentencing and that "'sending a person with congestive heart failure, a close family support system, and in his fifties would promote not respect, but likely derision for the law.'" 464 F.3d at 825 (quoting Sent. Tr. at 18).

On appeal, instead of deferring to the district court's individualized sentencing determination as this Court's decision in *Rita* requires, the court of appeals effectively applied *de novo* review and held: "Our review of the record and the district court's analysis of the § 3553(a) factors does not reveal the existence of the type of extraordinary circumstances necessary to justify such a reduction." 464 F.3d 825. Not appreciating the sentencing judge's reasoned analysis, the Eighth Circuit stated that "the district court failed to consider important factors, gave inappropriate

weight to irrelevant factors, and committed clear errors of judgment with respect to some relevant factors." *Id.* at 825-26. Accordingly, treating the sentence as a 100% variance, the court held: "What we said in an earlier case applies with equal force here: 'The goal of deterrence rings hollow if a prison sentence is not imposed in this case.'" *Id.* at 860 (citation omitted).

The Eighth Circuit's decision in *Gall* similarly exemplifies its disregard for reasoned probation sentences. Here the district court considered the various § 3553(a) factors including the guidelines range. *Gall*, 374 F. Supp. 2d 758. The court emphasized the absence of any aggravating factors and the fact that several *years* prior to the prosecution, Gall voluntarily withdrew from the conspiracy, earned a bachelor's degree, voluntarily sought alcohol and drug treatment, and started a successful business that employs numerous people. *Id.* at 762-63. Gall had a low criminal history score and his post-offense behavior was "exemplary"; for these reasons, the district court found that Gall was unlikely to re-offend and did not pose a threat to society. The court held that probation would be a sufficient punishment because it is "'a substantial restriction of freedom,'" *id.* at 763 (citation omitted), and imprisonment "would be counter effective by depriving society of the contributions of [Gall]" who has become a productive member of society. *Id.*

The district court sentenced Gall to 36 months' probation including specific substance abuse treatment and testing requirements after engaging in exactly the kind of nuanced and reasoned approach to sentencing that the statute requires. The district court's thorough evaluation is an impressive example of the kind of "refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing," *Koon*, 518 U.S. at 98, which this Court has said is entitled to substantial deference. *Rita*, 127 S. Ct. at 2474 (Stevens, J., concurring). Every aspect of the sentencing was approached with care, solemnity, and compassion, and by

any common understanding was "not unreasonable." The Eighth Circuit's reversal was a prime example of appellate usurpation of the sentencing judge's authority.

In additional cases, the courts of appeals have reversed probation sentences and *required* incarceration. *See, e.g.*, *Ture*, 450 F.3d at 358 ("The goal of deterrence rings hollow if a prison sentence is not imposed in this case."); *Pyles*, 482 F.3d at 292 ("Pyle's crack cocaine distribution offense is a serious crime that *must* be punished by a sentence of imprisonment.") (emphasis added); *United States v. Rattoballi*, 452 F.3d 127, 137 (2d Cir. 2006) ("The court's failure to impose a term of imprisonment was unreasonable."). However, as this Court remarked in *Koon*: "'[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" 518 U.S. at 97 (citation omitted); *see also* S. Rep. No. 98-225, at 150 ("[T]he discretion of the sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court"). This Court should put an end to the unlawful, unwise, and widespread practices in the circuits. Judge Bright's dissent in *Likens* got it right: "[T]he district judge determined that probation is right and just given all the circumstances. ... From the cold record before me, I can't say whether Mr. Likens deserves incarceration or not. ... [I]t is a close call—but not ours to make. The sentencing judge exercised his reasoned discretion and, without more, this court should not disturb it." 464 F.3d at 827.

III. DISFAVORING PROBATION IS ESPECIALLY INAPPROPRIATE FOR LOW-LEVEL DRUG OFFENDERS AND WHITE-COLLAR DEFENDANTS

There is ample evidence that guidelines sentences are greater than necessary for low-level drug offenders and white-collar defendants for two principal reasons. *First*, offense levels are calculated by rigid formulas that are widely acknowledged not to correlate with offense severity. For drug offenders, the guidelines place disproportionate

emphasis on drug quantity; for white-collar offenders, loss calculations often lead to guidelines sentences absurd on their face. *Second*, these defendants have low recidivism rates suggesting an appropriate emphasis on rehabilitation. In light of the guidelines flaws, the reproachful manner in which the courts of appeals view downward variances and probation for these defendants is particularly unjustified.

A. Probation Is Often An Appropriate Sentence For Low-Level Drug Offenders

The mechanical application of the guidelines to low-level drug offenders often results in sentences that are greater than necessary. The most important guidelines determinant (though rarely the most sensible) for sentencing of low-level drug offenders is drug type and quantity. U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 50 (2004) ("Fifteen Year Report") (noting that drug quantity is a "poor proxy for the culpability of low-level offenders"); *id.* at vii (explaining that "the guidelines' Drug Quantity Table[s] fail in some cases to reflect the relative harmfulness of different drugs"). Calculations driven by quantity often result in sentences for low-level offenders that "overlap with defendants who had much more significant roles in the drug scheme" and are more likely to re-offend. *See* Dep't of Justice ("DOJ"), *An Analysis of Non-Violent Drug Offenders With Minimal Criminal Histories* (1994). The Commission has even acknowledged that guidelines calculations for first-time offenders are harsher than necessary because Criminal History Category I overstates the likelihood of recidivism for true first-time offenders and that "sentencing reductions for 'first offenders' are supported by the recidivism data and would recognize their lower re-offending rates." U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computations of the Federal Sentencing Guidelines* 15 (2004); *see also* U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* (2007).

That quantity is a "poor proxy for the culpability of low-level offenders, who may have contact with significant amounts of drugs, but who do not share in the profits or decision-making," *Fifteen Year Report* 50, is demonstrated by a problem Congress has noted. In 2005, the Public Safety, Sentencing and Incarceration Reform Caucus of the House of Representatives held a briefing on "The Girlfriend Problem: How Sentencing Laws Affect Women and Children." The Committee observed that "[w]omen are the fastest growing group in the ever-expanding prison population," in part based on "drug laws [that] punish not just those who sell drugs, but also a wide range of people who help or associate with those who sell drugs." Because the guidelines focus on quantity, "[w]here a person is charged with conspiracy in a drug crime, sentences often reflect the total amount of drugs possessed or sold by everyone in the operation. As a result, even when they have minimal, if any, involvement in the drug trade, non-violent women with little or no prior criminal history are increasingly captured in the ever widening net cast by the war on drugs. They are often subjected to the same, or in some cases, harsher sentences than the principals in the drug trade at whom the sentencing statutes were aimed." Thus, the Committee found, "[i]n too many cases, women are punished for the act of remaining with a boyfriend or husband engaged in drug activity, who is typically the father of her children. Many of these women have histories of physical and sexual abuse and/or untreated mental illness." *See* Legislative Briefing on "The Girlfriend Problem," *at* http://sentencing.typepad.com/sentencing_law_and_policy/2005/06/legislative_bri.html and internal link (last visited July 24, 2007); *see also United States v. Greer*, 375 F. Supp. 2d 790 (E.D. Wis. 2005) (consider these factors when imposing probation sentence).

Sentencing Commission statistics indicate that fewer than five percent of defendants in drug cases receive straight probation or other intermediate sanctions as alternatives to incarceration. *See Fifteen Year Report* 52.

However, many district and circuit judges have expressed their interest in being able to impose sentences other than incarceration for certain drug and nonviolent offenses. *See* U.S. Sentencing Comm'n, *Survey of Article III Judges* (2003). And in 2001, the then-Commissioner urged an overhaul of the guidelines to allow for alternatives to incarceration for first-time offenders. Michael Edmund O'Neill, *Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 B.C. L. Rev. 291, 295-96 (2001) ("[I]t is doubtless preferable to reintegrate a first-time (or otherwise low-level) offender into the community than to incarcerate that individual. Aside from the capital costs of prison, there are important human costs; namely, stigmatizing the offender in such a way as to impede his ability to become socially productive.").[11]

Better yet, there is substantial evidence that probation and sentencing alternatives work. Studies document it and the experiences of the states cannot be ignored. *See* Michael Tonry, *The Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 5-7, 33-34 (2006) (identifying a consensus that well-targeted treatment programs in many states significantly reduce recidivism). For example, New York

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[11] In addition, the Chairman of the nation's largest association of prosecutors recently emphasized the need for a renewed focus on rehabilitation in combination with incarceration where necessary, and urged Congress to support community diversion programs. *See* Making Communities Safer: Youth Violence & Gang Interventions that Work: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. On the Judiciary, 110th Cong. (2007) (oral statement of Paul A. Logli, Chairman of the Board of the National District Attorneys Association) ("What helps us make those [prosecutorial] decisions is if we have available to us programs ... that give us alternatives .... I don't need any more laws. I've got all the criminal laws I need .... I don't need any more sanctions, the sentences are plenty tough. I've got all the discretion I need. What I need is ... programs on the street that have staying power and that have credibility and that will work with people that I can refer people to. Because what I do have is the hammer. I have the coercion that might just make that person stick to a program.") (video on file with counsel).

diverts certain non-violent drug offenders to specialized drug courts for continued monitoring by a judge who retains the authority to give positive reinforcement or impose a variety of sanctions (including jail time if necessary). N.Y. State Comm'n on Drugs and the Courts, *Confronting the Cycle of Addiction & Recidivism: A Report to Chief Judge Judith S. Kaye* (2000), *available at* http://www.courts.state.ny.us/reports/addictionrecidivism.shtml (last visited July 24, 2007); *see also United States v. Brennan*, 468 F. Supp. 2d 400, 404 (E.D.N.Y. 2007) (Weinstein, J.) (describing N.Y. drug courts).

Chief Judge Kaye explained that drug courts became necessary because, "'in many of today's cases, the traditional [incarceration] approach yields unsatisfying results.'" *Brennan*, 468 F. Supp. 2d at 404 (quoting Chief Judge Judith S. Kaye, *Making the Case for Hands-On Courts*, Newsweek, Oct. 11, 1999, at 13). Judge Weinstein has noted that "drug treatment courts have demonstrated significant success in helping offenders with substance abuse problems address the issues underlying their criminal behavior so they can turn their lives around." *Id.* at 405. New York courts also operate the acclaimed "Drug Treatment Alternative-to-Prison Program" (DTAP), a program pushed by local prosecutors to divert felony drug offenders from state prison to home-based treatment programs. Kings County District Attorney's Office, DTAP: Drug Treatment Alternative-to-Prison Program, *available at* http://www.brooklynda.org/DTAP/DTAP.htm (last visited July 24, 2007). An independent evaluation by Columbia University, funded by the National Institute on Drug Abuse, found that DTAP participants were 67% less likely to return to prison than non-participants—at half the cost of incarceration. *See* National Center on Addiction and Substance Abuse at Columbia University, White Paper, *Crossing the Bridge: An Evaluation of the Drug Treatment Alternative-to-Prison (DTAP) Program*, at ii (2003), *available at* http://www.casacolumbia.org/Absolutenm/articlefiles/Crossing_the_bridge_March2003.pdf.

The success of alternative programs in New York illustrates the utility of alternatives to incarceration to achieve the purposes of sentencing. In light of the guidelines' unjust focus on drug quantity resulting in Commission-acknowledged sentences that are greater than necessary in many cases, and the states' successful use of sentencing alternatives, district judges ought to be permitted to take note of these results and impose probation where appropriate to "avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6); *see also generally United States v. Clark*, 434 F.3d 684, 687 (4th Cir. 2006) ("[T]he consideration of state sentencing practices [by district courts] is not necessarily impermissible per se."); *Brennan*, 468 F. Supp. 2d at 407 ("Section 3553(a)(6) should be construed as covering disparities in state-federal as well as federal-federal comparative sentencing."). *But see United States v. Jeremiah*, 446 F.3d 805, 807-08 (8th Cir. 2006) (holding that considering federal/state disparities would undermine the uniformity of federal sentences).

Taking account of the states' experiences is eminently sensible not only for Congress and the Commission as it makes basic sentencing policy choices, but also for appellate courts as they assess the reasonableness of sentences imposed by district courts. Indeed, the states' successful use of alternative sentences is especially telling in drug cases because of the similarity of crimes that are prosecuted in state versus federal court. *See* Christine DeMaso, Note, *Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity Between State and Federal Sentences Under* Booker*?*, 106 Colum. L. Rev. 2095, 2119 (2006) (noting that the federalization of much criminal law effectively means that a drug offender can be tried in federal or state court (or both).

Even though the Commission's research reveals that guidelines sentences can be excessive for low-level drug offenders and provides empirical support for sentencing reductions (and probationary sentences) for first-time

offenders, the courts of appeals have frequently reversed downward variances to probation for low-level drug offenders as unreasonably lenient. *See, e.g., Pyles*, 482 F.3d 282 (where guidelines range was 63-78 months, vacating sentence of 60 months' probation including six months' home detention as unreasonable); *United States v. Gentile*, 473 F.3d 888 (8th Cir. 2007) (vacating sentence of one day of imprisonment and probation for Criminal History Category I drug offender); *United States v. Miller*, 484 F.3d 964 (8th Cir. 2007) (vacating sentence of 36 months' probation including 12 months' home detention for Criminal History Category I drug offender). This standard detracts from rather than enhances sensible sentencing policy.

B. Proportionality Review Has Taken Away Judges' Discretion In White Collar Cases

Excessive emphasis on the mechanical guidelines calculations, particularly post-Sarbanes-Oxley, has led to extremely harsh sentences for white-collar offenders. For example, at age 63, Bernie Ebbers was sentenced to 25 years, which the Second Circuit noted was "longer than the sentences routinely imposed by many states for violent crimes, including murder, or other serious crimes such as serial child molestation." *United States v. Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006).[12]

These extreme sentences are a result of guidelines calculations that base the offense level for economic crimes on the pecuniary loss resulting from the crime, much like drug quantity for drug offenders. *See Fifteen Year Report* 50. Judge Rakoff has noted the "travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guidelines calculations

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[12] Other very lengthy white-collar sentences include 15 years for John Rigas, the 80-year-old founder of Adelphia, 20 years for Timothy Rigas, 30 years for Patrick Bennet, and 20 years for Steven Hoffenberg. *See generally* Ellen S. Podgor, *Throwing Away the Key*, 116 Yale L.J. Pocket Part 279 (2007) (noting the long sentences now routinely given to first-time white-collar offenders, including the guidelines sentence of over 24 years' imprisonment for Jeffrey Skilling).

can visit on human beings if not cabined by common sense." *United States v. Adelson*, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006); *see also* Ellen S. Podgor, *Throwing Away the Key*, 116 Yale L.J. Pocket Part 279, 280 (Feb. 2007) ("The accused becomes irrelevant in a sentencing world ruled by the cold mathematical calculations found in the sentencing Guidelines.").

As many scholars have documented, loss calculations are often imprecise and subject to manipulation by prosecutors. *See* Peter J. Henning, *White Collar Crime Sentences After Booker: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 McGeorge L. Rev. 757 (2006) (determination of loss is often the most important factor in applying the guidelines, but the guidelines provide little guidance for the calculation); Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After* Booker, 47 Wm. & Mary L. Rev. 721, 739-40 (2005) (noting flexibility prosecutors have to manipulate loss amounts to effect sentencing). Guidelines ranges calculated based on speculative and highly contested pecuniary loss estimates now often result in guidelines sentences ranges that even *exceed* the statutory maximum for a given offense. *See, e.g., United States v. Botts*, 135 Fed. Appx. 416, 417-18 (11th Cir. 2005) (PSR loss calculation of $1.4 billion and Criminal History Category I translated to range of 151 to 188 months', triple the 60 month statutory maximum). In *Adelson*, the guidelines calculation for first offender who pleaded guilty to securities fraud was a draconian 85 years' imprisonment. The calculation resulted from the loss calculation's "multiplier effect," that, for a publicly-traded company with millions of shares, "may lead to guideline offense levels that are, quite literally, off the chart." 441 F. Supp. 2d at 509. Indeed, the guidelines recommendation was so absurd that the government, contrary to its normal sentencing practices, did not seriously advocate for a within-guidelines sentence. As Judge Rakoff noted, the guidelines in this area have "so run amok that [the calculations] are patently absurd on their face." *Id.* at 515.

These lengthy sentences are even inconsistent with the Commission's goal to "ensure 'a short but definite period of confinement' for a larger proportion of these 'white collar' cases, both to ensure proportionate punishment and to achieve deterrence." *Fifteen Year Report* 56 (citation omitted). Substantial evidence has emerged since the guidelines were written suggesting that even a short term of imprisonment is often not necessary to achieve the goals of sentencing for some defendants in white-collar cases. For example, studies have shown that the *length* of imprisonment does not have a significant effect on deterrence in the white collar context. *See* A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. Leg. Stud. 1, 12 (1999) ("the disutility of being in prison at all may be substantial and the stigma and loss of earning power may depend relatively little on the length of imprisonment," suggesting "that less-than-maximal sanctions, combined with relatively high probabilities of apprehension, may be optimal"). The guidelines are not currently functioning properly in the white-collar context judged by the Commission's or Congress's goals.

This evidence suggests that for white-collar defendants who are first-time offenders, probationary and alternative sentences will frequently be sufficient to achieve the purposes of sentencing and ought to remain available for a district judge to consider in appropriate cases, without the concern of likely reversal that has been shown to be inherent in proportionality review. However, as the stark results of reasonableness review demonstrate, the courts of appeals have effectively eliminated alternative sentences in white collar cases from district judges' discretion by treating punishments of probation, fines, and home detention as extreme departures and by requiring extraordinary justifications for such departures (and by comparing those sentences with the amount of loss the government alleges). *See, e.g., United States v. Livesay*, 484 F.3d 1324, 1334 (11th Cir. 2007) (reversing below-guidelines

sentence and pointing to financial "enormity of the crimes"); *United States v. Wallace*, 458 F.3d 606, 614 (7th Cir. 2006) ("[I]t is the fact that the court chose to eliminate any meaningful incarceration [and imposed probation] for a crime that involved $400,000 of intended loss that makes this such an extraordinary choice."). Using this reasoning, courts of appeals have frequently reversed downward variances in white collar cases. In *United States v. Thurston*, for example, the guidelines range was capped by a statutory maximum of 60 months' imprisonment, and the district court first sentenced Thurston to 3 months' incarceration and 24 months' supervised release after downwardly departing from the then-mandatory guidelines. 456 F.3d 211 (1st Cir. 2006). The First Circuit reversed and ordered that the 60-month sentence be imposed. This Court remanded the case in light of *Booker*, and the First Circuit remanded the case for resentencing before a new district judge. The new judge again imposed a sentence of 3 months' incarceration and 24 months' supervised release. The First Circuit again reversed, rejecting the separate conclusions of *two different district judges*. The court ignored the 24 months' supervised release, treated the sentence as an unreasonably lenient 95% variance, and opined that if it were the sentencing court, it would likely sentence at the statutory maximum. The First Circuit remanded with instructions that absent an extraordinary development, a sentence of no less than 36 months' *incarceration* must be imposed. That, unfortunately, is simply another example of appellate review run amok.

CONCLUSION

For these reasons, this Court should reject proportionality review and direct the courts of appeals to review probation sentences using the same deferential abuse of discretion standard applied to other sentencing decisions—whether within or outside the suggested guidelines range.

Respectfully submitted,

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FILE COPY

No. 06-7949

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BRIAN MICHAEL GALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX: VOLUME I OF II

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
(CENTRAL)

[Filed 4/28/2004]

Case No. 4:04-cr-00116-RP-RAW-5

UNITED STATES OF AMERICA,
Plaintiff,

v.

BRIAN MICHAEL GALL,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
04/28/2004	1	INDICTMENT by USA Counts filed against Antonio Fernandez Perez (1) count(s) 1, Reynaldo Cortez (2) count(s) 1, Jesse Lee Crawford (3) count(s) 1, Brooks Thomas Robinson (4) count(s) 1, Brian Michael Gall (5) count(s), 1, Theodore Joseph Sauerberg (6) count(s) 1, Corey Alan Coleman (7) count(s) 1, Jarod James Yoder (8) count(s) 1 (sd) (Entered: 04/29/2004)
		* * * *
04/29/2004		ARREST Warrant issued for Antonio Fernandez Perez, Reynaldo Cortez Sr, Jesse Lee Crawford, Brooks Thomas Robinson, Brian Michael Gall, Theodore Joseph Sauerberg, Corey Alan Coleman, Jarod James Yoder (sd) (Entered: 04/29/2004)

DATE	NO.	PROCEEDINGS
06/23/2004	34	CLERK'S COURT MINUTES: before Magistrate Judge Ross A. Walters dft Brian Michael Gall arraigned; not guilty to Ct. 1 plea accepted; Attorney Marc Milavitz present; defendant released on bond pending trial. () Crt Rptr: Taped (sd) (Entered: 06/23/2004)
06/23/2004	35	ORDER setting conditions of release for Brian Michael Gall by Magistrate Judge Ross A. Walters ; OR bond (sd) (Entered: 06/23/2004)
		* * * *
07/01/2004	41	ARREST Warrant returned executed as to defendant Brian Michael Gall ; defendant arrested on 6/23/04 (sd) (Entered: 07/01/2004)
		* * * *
03/02/2005	175	Minute Entry for proceeding held before Judge Robert W. Pratt: Change of Plea Hearing as to Brian Michael Gall held on 3/2/2005. Begin 10:00 a.m., end 10:45 a.m. Sentencing set for 5/27/2005 at 1:30 p.m. in Room 265 – 2nd Floor before Judge Robert W. Pratt. (Court Reporter Kelli Mulcahy.) (jhm) Modified on 3/2/2005 to time of hearing. (jhm,). (Entered: 03/02/2005)
		* * * *
03/02/2005	177	PLEA AGREEMENT as to Brian Michael Gall (jhm) (Entered: 03/02/2005)
		* * * *

DATE	NO.	PROCEEDINGS
05/23/2005	193	SENTENCING MEMORANDUM/BRIEF by Brian Michael Gall (rmj) (Entered: 05/23/2005)
05/25/2005	194	*SEALED* MOTION for Downward Departure by Brian Michael Gall. (rmj) (Entered: 05/25/2005)
		* * * *
05/27/2005	198	Minute Entry for proceedings held before Judge Robert W. Pratt: Sentencing held on 5/27/2005 for Brian Michael Gall (5). Begin: 1:30 p.m., end: 3:00 p.m. As to Count 1, Defendant sentenced to a 36 month term of probation. (Court Reporter Kelli Mulcahy.) (jhm). Please see additional attachment, corrected minutes, added on 5/31/2005 (jhm). Modified on 5/31/2005 to provide notice of corrected minutes attachment. (jhm). (Entered: 05/31/2005)
05/27/2005	199	JUDGMENT as to Brian Michael Gall (5), Count(s) 1, Defendant sentenced to a 36 month term of probation. Entered by Robert W. Pratt on 5/27/2005. OJ No. 323:26 (jhm). (Entered: 05/31/2005)
		* * * *
06/02/2005	201	SENTENCING MEMORANDUM as to Brian Michael Gall . Entered by Robert W. Pratt on 6/2/2005. (mlm,) (Entered: 06/02/2005)
		* * * *

DATE	NO.	PROCEEDINGS
06/06/2005	203	SATISFACTION OF MONETARY IMPOSITION OF JUDGMENT as to Brian Michael Gall *CVF Assessment* regarding Judgment 199 (Hayward, Gary) (Entered: 06/06/2005)
06/08/2005	204	TRANSCRIPT of Proceedings as to Brian Michael Gall re 198 Sentencing, held on 5/27/05 before Judge Robert W Pratt. Court Reporter: Kelli M Mulcahy, Page No(s): 1-57. THIS DOCUMENT IS NOT PART OF THE ELECTRONIC CASE. ORIGINAL LOCATED IN THE CLERK'S OFFICE. (gk,) (Entered: 06/09/2005)
		* * * *
06/21/2005	210	PRESENTENCE INVESTIGATION REPORT (Sealed) as to Brian Michael Gall. (jhm). (Entered: 06/21/2005)
		* * * *
06/24/2005	212	NOTICE OF APPEAL by USA as to Brian Michael Gall re 199 Judgment. (Griess, Jason) (Entered: 06/24/2005)
		* * * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Filed 7/16/2005]

Docket No. 05-3001

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

BRIAN MICHAEL GALL,
Defendant-Appellee.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
07/19/2005	Criminal Case Docketed Dist. Ct. Office: Des Moines
	* * * *
09/29/2005	BRIEF FILED—Brief of Appellant-USA in 05-3001 7,717 words w/addendum 10 copies—w/service 9/28/05 w/diskette. [05-3001] [1958270]
	* * * *
11/18/2005	BRIEF FILED—Brief of Appellee—Brian Michael Gall in 05-3001. 5,266 words w/addendum—10 copies—w/service 11/18/05. w/CDROM [05-3001] [1977697]
	* * * *

DATE	PROCEEDINGS
02/14/2006	ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES James B. Loken, Chief Circuit Judge, Pasco M. Bowman, Circuit Judge, Lavenski R. Smith, Circuit Judge. Jason T. Griess for Appellant USA in 05-3001. Marc Milavitz for Appellee Brian Michael Gall in 05-3001. Rebuttal by: Jason T. Griess. RECORDED. [05-3001]
05/12/2006	THE COURT: James B. Loken, Pasco M. Bowman, Lavenski R. Smith. OPINION FILED by Lavenski R. Smith, Authoring Judge PUBLISHED. [05-3001] [2044387]
05/12/2006	JUDGMENT: James B. Loken, Pasco M. Bowman, Lavenski R. Smith. The judgment of the lower court is REVERSED and REMANDED in accordance with the opinion. [05-3001] [2044387]
05/26/2006	PETITION for REHEARING with petition for rehearing en banc. Filed by Appellee Brian Michael Gall in 05-3001, w/service 5/24/06., TO COURT [05-3001]
07/07/2006	JUDGE ORDER: denying petition for Rehearing with petition for rehearing en banc [2050230-1] filed by Brian Michael Gall. Petition for panel Rehearing is also denied. [05-3001] [2064684] —Published Order., DENIED
08/02/2006	MANDATE ISSUED [05-3001]

* * * *

DATE	PROCEEDINGS
12/01/2006	U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on November 22, 2006. Supreme Ct. Case No.: 06-7949 [05-3001] [2119147]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Criminal No. 04-

INDICTMENT

T. 21 U.S.C. § 846, T. 21 U.S.C. § 841(a)(1),
T. 21 U.S.C. § 841(b)(1)(A)(ii)(II),
T. 21 U.S.C. § 841(b)(1)(C), T. 21 U.S.C. § 841(b)(1)(D),
T. 21 U.S.C. § 853(a)(1) and (2),

UNITED STATES OF AMERICA,
Plaintiff,

v.

ANTONIO FERNANDEZ PEREZ, REYNALDO CORTEZ, SR., JESSE LEE CRAWFORD, BROOKS THOMAS ROBINSON, BRIAN MICHAEL GALL, THEODORE JOSEPH SAUERBERG, COREY ALAN COLEMAN, and JAROD JAMES YODER,
Defendants.

THE GRAND JURY CHARGES:

COUNT 1

(Conspiracy to Distribute Drugs)

From a date unknown to the grand jury, but beginning by on or about May of 1996, and continuing to on or about October 30, 2002, in and about the Southern District of Iowa and elsewhere, the defendants, ANTONIO FERNANDEZ PEREZ, REYNALDO CORTEZ, SR., JESSE CRAWFORD, BROOKS ROBINSON, BRIAN MICHAEL GALL, THEODORE JOSEPH SAUERBERG, COREY ALAN COLEMAN, and JAROD JAMES YODER, did knowingly and intentionally conspire with each other and with other persons,

known and unknown to the Grand Jury, to knowingly distribute controlled substances, that is (1) a mixture and substance containing methylenedioxymethamphetamine (MDMA), a Schedule I controlled substance; and (2) at least 5 kilograms of a mixture and substance containing cocaine, a Schedule II controlled substance; and (3) a mixture and substance containing marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

This is a violation of Title 21, United States Code, Sections 846 and 841(b)(1)(A)(ii)(II), 841(b)(1)(C), and 841(b)(1)(D).

THE GRAND JURY FURTHER CHARGES:

ALLEGATION OF FORFEITURE

In committing the felony offense alleged in Count 1 of this indictment, punishable by imprisonment of more than one year, REYNALDO CORTEZ, SR.:

(a) acquired the below-described property, which was derived from the proceeds obtained directly or indirectly as a result of the commission of the aforesaid violation of 21 United States Code, Section 846; and

(b) used, or intended to use, the below-described property in any manner or part, to commit or facilitate the commission of the aforesaid violation of 21 United States Code, Section 846.

This property includes, but is not limited to the following:

(a) $19,100.00, more or less, in United States Currency, and

(b) 7500 Bloomington Avenue, Burbank, California, more fully described as:

Lot 41 of Tract No. 17309, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in book 443 pages 11 and 12 of

Maps, in the office of the county recorder of said county.

Except all right to oils and minerals in and under said land. But without right of entry to the surface of said land. As recited in the declaration of restriction executed by Cobasset Homes, Inc., a corporation; recorded in book 42390 page 428, official records and excepted in deed recorded December 2, 1953.

By virtue of the commission of one or more of the felony offenses charged in this indictment by the defendant REYNALDO CORTEZ, SR., any and all interest the defendant has in the above-described property is forfeitable to the United States upon conviction, pursuant to 21 United States Code, Sections 853(a)(1) and (a)(2).

If any of the property described as being subject to forfeiture pursuant to Title 21, United States Code, Section 853, as a result of any act or omission of the defendant,

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third person;

(3) has been placed beyond the jurisdiction of the Court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendant up to the value of said property forfeitable in the paragraphs above.

The aforementioned property is subject to forfeiture pursuant to Title 21, United States Code, Sections 853(a)(1) and 853(a)(2).

A TRUE BILL.

_____
FOREPERSON

Stephen Patrick O'Meara
United States Attorney

By: _____
Jason T. Griess
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Criminal No. 04-116

UNITED STATES OF AMERICA,
Plaintiff,

v.

BRIAN MICHAEL GALL,
Defendant.

PLEA AGREEMENT

IT IS HEREBY AGREED by and between the plaintiff, the United States of America, and the defendant, BRIAN MICHAEL GALL, with his attorney, Marc Milavitz, as follows:

A. *CHARGES*

1. *Subject Offense.* Defendant will plead guilty to Count 1 of the Indictment which charges a violation of Title 21, United States Code, Section 846 and 841(b)(1)(C), that is, conspiracy to distribute a mixture and substance containing methylenedioxymethamphetamine (MDMA), a Schedule I controlled substance.

2. *Charges Being Dismissed.* There are no charges to be dismissed.

3. *No Further Prosecution.* The United States of America agrees that the defendant will not be charged in the Southern District of Iowa with any other federal criminal offense under Title 18 or Title 21, United States Code, arising from or directly relating to this investigation, except for any crimes of violence. This paragraph and this plea agreement do

not apply to any criminal act which the defendant did not fully disclose to law enforcement during his proffer interviews.

B. *CONSEQUENCES OF PLEA*

4. *Maximum Punishment.* Count 1 is punishable by a maximum term of 20 years imprisonment, a maximum fine of not more than $1,000,000.00, or both, plus a special assessment of $100.00, and a term of supervised release of at least 3 years.

5. *Mandatory Minimum.* There is no mandatory minimum sentence.

6. *Mandatory Detention.* Pursuant to the Mandatory Detention for Offenders Convicted of Serious Crimes Act (18 U.S.C. § 3143), the defendant understands that the law requires that defendant may be ordered to be placed in the custody of the United States Marshall's Service following the completion of the entry of the guilty plea to await imposition of sentence. The defendant understands that defendant bears the burden to show the court that defendant should remain on conditions of release pending sentencing.

C. *SENTENCING CONSIDERATIONS*

7. *Sentencing Guideline—Factors.* The sentence to be imposed is solely within the District Court's discretion, with due consideration for the United States Sentencing Commission Guidelines which apply to this offense.[1] The Sentencing Guidelines establish a sentencing range based upon factors determined to be present in the case, which include, but are not limited to the following:

a. the quantity of drugs involved, with the parties stip-

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[1] The parties stipulate that the November 1, 1999 edition of the United States Sentencing Guidelines apply to the defendant's offense conduct in this case.

ulating as a recommendation to the court that the defendant is responsible for at least 2,500 grams of a mixture and substance containing methylenedioxymethamphetamine (MDMA), or the equivalent of at least 87.5 kilograms of marijuana;

b. the defendant's role in the offense;

c. criminal history (prior convictions); and

d. acceptance or lack of acceptance of responsibility;

8. *No Promises.* The United States makes no representations or promises as to the sentence to be imposed, as this is solely within the District Court's discretion. Although the parties may have discussed the possibilities of various factors having an impact on the sentence and the possibility of a certain sentencing range, the parties agree that no discussion resulted in any express or implied promise or guarantee concerning the actual sentence to be imposed.

9. *No Right to Withdraw Plea.* The defendant understands that the defendant will have no right to withdraw the defendant's plea if the sentence imposed, or the application of the United States Sentencing Commission Guidelines, is other than what the defendant anticipated. The parties understand the Court may defer its decision to accept the plea until there has been an opportunity to review a pre-sentence investigation report.

10. *Evidence at Sentencing.* The defendant, the defendant's attorney, and the plaintiff's attorney will be permitted to make whatever comment and evidentiary offer they deem appropriate at the time of the guilty plea, sentencing, or any other proceeding related to this case, provided such offer or comment does not violate any other provision of this agreement. The parties are also free to provide all relevant information to the U. S. Probation Office for use in preparing a pre-sentence report.

11. *Fines/Costs.* Issues relating to fines and/or costs of incarceration are not dealt with in this agreement, and the parties are free to espouse their respective positions at sentencing.

12. *Special Assessment.* The defendant agrees to pay to the United States a special assessment of $100.00, as required by Title 18, United States Code, § 3013. The defendant agrees to make such payment (by cashiers check or money order payable to "Clerk, U. S. District Court") to the Clerk of the United States District Court for the Southern District of Iowa within two weeks (14 days) of the execution of this agreement or by the time the defendant enters his guilty plea, whichever first occurs. The defendant understands that failure to pay the special assessment constitutes a material breach of this agreement.

D. *COOPERATION*

13. *Full Cooperation.* The defendant agrees to fully cooperate with the government in its investigation within the Southern District of Iowa and elsewhere, and will provide complete and truthful information to the attorneys and law enforcement officers of the government, any federal grand jury, and any Court. The defendant will answer all questions concerning any criminal matters of which defendant has knowledge truthfully, and defendant will not withhold any information. The defendant will neither attempt to protect any person or entity through false information or omission, nor falsely implicate any person or entity. The defendant understands that failure to provide complete and truthful information constitutes a material breach of this agreement.

14. *Financial Statement.* The defendant agrees to fully and truthfully complete the financial statement, and provide the U. S. Attorney's Office with any information or documentation in the defendant's possession or control regarding the defendant's financial affairs. Failure to truthfully complete

the financial statement form in its entirety, or failure to submit to a financial examination when requested, will constitute a breach of this agreement and may, in the sole discretion of the U.S. Attorney's Office, result in the revocation of the agreement and the institution or reinstatement of other criminal charges against the defendant.

15. *Access to Defendant Upon Entry Into Plea Agreement.* From and after the date of the parties entry into this plea agreement, the defendant agrees to be available to perform the cooperation provided by this plea agreement without the United States Attorney first notifying and receiving authorization from the defendant's attorney. Attorneys and investigators for the United States have standing authority to request the defendant to provide cooperation required by this agreement. Should the defendant elect to speak to anyone other than attorneys and investigators for the United States about the information known to the defendant regarding crimes, the defendant shall, prior to discussing such information with such other person, give notice to United States Attorney a reasonable time in advance of such discussion to allow representatives of the United States Attorney to be present for such discussion. The United States Attorney requests to have a representative present or any such discussions, should they occur.

16. *Communications with Defendant.* In furtherance of the "Cooperation" provisions of this agreement, attorneys and investigators of the United States are hereby authorized to communicate directly with the defendant without any further notification to or authorization from the defendant's attorney. The United States Attorney agrees that should the defendant indicate that he wants to confer with his attorney prior to further activity, communications will be suspended until the defendant has the opportunity to confer with his attorney. The United States desires to have a representative present if the defendant ever elects to discuss his knowledge of criminal

activity with any person other than its attorneys and investigators. The defendant agrees that he will not discuss his knowledge of criminal activity with any person without first giving the United States notice of his intention and affording the United States the opportunity to have a representative present for any such discussion.

17. *Truthful Testimony*. The United States insists upon the defendant telling the truth at all times, whether it be during this investigation or as a witness at trial, and regardless of who asks the questions (the prosecutor, the law enforcement agent, the judge, or the defense attorney). In the event the defendant should be called as a witness, the defendant's failure to provide truthful information will render this agreement voidable at the sole discretion of the United States, and will subject the defendant to a prosecution for perjury which is punishable by a fine of not more than $250,000.00 and a term of imprisonment of not more than five years, or both such fine and imprisonment.

18. *Debriefing Statements—Limitation of Usage*. Pursuant to U.S. Sentencing Guidelines Section 1B1.8, the government agrees not to use against the defendant any self-incriminating information provided by the defendant in his proffer interviews or any subsequent interview as provided for in paragraphs 15 and 16 of this agreement, except as follows:

a. if the defendant admits conduct in a proffer interview or debriefing and then denies the same or presents evidence to the contrary at any hearing subsequent to the signing of this plea agreement; or,

b. to the extent as may be permitted by paragraph 20 of this agreement in the case of a breach of this agreement by the defendant.

19. *Effect of a Violation of Law*. Any violation of law or any violation of pretrial release conditions committed by the

defendant will render this agreement voidable at the sole discretion of the United States.

20. *Breach—Use of Information.* If the defendant breaches the terms and conditions of this agreement, the government is free to use against the defendant any statement given by the defendant in proffer interviews, debriefings or during testimony. Such statements or testimony may be used against the defendant in any criminal prosecution including prosecutions of the instant offense, perjury, obstruction of justice, or other applicable criminal prosecution relating to the giving of a false statement.

21. *Polygraph Examination.* The defendant agrees that the plaintiff, at its expense, may require that the defendant submit to polygraph examination(s). Any refusal to take a polygraph examination is a material breach of the plea agreement. A finding by the examiner that the defendant shows deception during a polygraph examination such that the examiner does not have confidence that the defendant has told the truth concerning any matter constitutes a breach of the plea agreement. The defendant shall have an opportunity to correct any information that results in a deceptive response found by the examiner, if the defendant does not satisfy the examiner concerning the deception then the same shall be considered a material breach of the plea agreement.

E. *SUBSTANTIAL ASSISTANCE*

22. *United States Attorney Motion.* Should the Defendant fully comply with all the terms and conditions of this plea agreement and the United States Attorney concludes that the Defendant has provided substantial assistance in the investigation or prosecution of one or more other persons who have committed a criminal offense, the United States Attorney may file a motion with the Court, requesting the Court to depart from the sentencing guidelines in its sentencing of the Defendant. Such motion may be made pursuant to United

States Sentencing Guideline Section 5K1.1 or Title 18, United States Code, Section 3553(e), or both. The decision to file a motion for departure will be in the sole discretion of the United States Attorney. The Defendant understands that the United States Attorney will decide whether the Defendant has performed substantial assistance sufficient to warrant such a motion. A proffer interview or a debriefing statement does not necessarily constitute substantial assistance to the United States. The Defendant further understands that if a motion is filed, the Court will decide whether the Defendant has performed substantial assistance and, if so, the amount of reduction in sentence that is to be granted.

23. *Amount of Reduction.* The appropriate reduction, if any, shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

a. the court's evaluation of the significance and usefulness of the Defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

b. the truthfulness, completeness, and reliability of any information or testimony provided by the Defendant;

c. the nature and extent of the Defendant's assistance;

d. any injury suffered, or any danger or risk of injury to the Defendant or his/her family resulting from Defendant's assistance;

e. the timeliness of the Defendant's assistance.

24. *Waiver of Speedy Trial.* The defendant waives and agrees to waive any and all rights under the Speedy Trial Act and understands and agrees that sentencing may be delayed until the cooperation phase of this agreement has been completed. Defendant stipulates that such a delay is in Defendant's best interest and in the interest of justice and con-

stitutes full and sufficient grounds for the Court to find that any delay in this judicial process regarding the defendant is excludable time in computing compliance with any federal speedy trial requirements which may apply to this matter. This waiver is necessary so that the Court will have the benefit of all relevant information regarding defendant's cooperation at the time of sentencing, should the United States Attorney, in his discretion, elect to file a motion pursuant to paragraph 22 of this agreement. Completion of the defendant's cooperation will be determined by this United States Attorney Office, in its sole discretion.

F. *GENERAL MATTERS*

25. *Voluntariness of Plea.* The Defendant acknowledges that he is entering into this plea agreement and is pleading guilty because he is guilty. He further acknowledges that he is entering into this agreement without reliance upon any discussions between the government and himself (other than those described in this plea agreement), without promise of benefit of any kind (other than any concessions contained in this plea agreement), and without threats, force, intimidation, or coercion of any kind. He further acknowledges that he understands the nature of the offenses to which he is pleading guilty, including the penalties provided by law.

26. *Limited Scope of Agreement.* This agreement does not limit, in any way, the right or ability of the government to investigate or prosecute the defendant for crimes occurring outside the scope of this agreement. Additionally, this agreement does not preclude the government from pursuing any civil or administrative matters against the defendant, including, but not limited to, civil tax matters and civil forfeiture, which arise from, or are related to, the facts upon which this investigation is based.

27. *Entire Agreement.* This plea agreement, and any attach ments, constitute the entire agreement between the parties. No

other promises of any kind, express or implied, have been made to the Defendant by the United States or by its agents.

28. *Factual Stipulations.* Attached hereto as Attachment "A", and incorporated by reference herein, are factual stipulations entered into between the parties, including the factual stipulations of the defendant's offense conduct relating to each subject offense.

29. *Use of Information.* If the defendant breaches the terms and conditions of this agreement, or is allowed to withdraw his guilty plea for any reason, the government is free to use against the defendant Attachment "A" of this agreement. Attachment "A" may be used against the defendant in any criminal prosecution including prosecutions of the instant offense, perjury, obstruction of justice, or other applicable criminal prosecution relating to the giving of a false statement.

30. *Venue.* Defendant agrees that the offense conduct relating to the subject offenses was committed, in whole or in part, in the Southern District of Iowa, and that the U.S. District. Court, Southern District of Iowa, has proper venue of this agreement.

31. *Public Interest.* The Plaintiff and Defendant state this plea agreement is in the public interest and it takes into account the benefit to the public of a prompt and certain disposition of the case and furnishes adequate protection to the public interest and is in keeping with the gravity of the offense and promotes respect for the law.

32. *Execution/Effective Date.* This agreement does not become valid and binding until the Plea Agreement, the Attachment A (Stipulation of Facts), and the Statement by Defendant in Advance of Plea of Guilty are executed by each of the parties and their counsel shown below. The United States Attorney's Office may withdraw this plea agreement offer at any time prior to its acceptance and execution by the

defendant and receipt of the documents at the United States Attorney's Office.

The undersigned hereby accept and agree to the terms and conditions set forth in this Plea Agreement.

H. *SIGNATURES*

33. *Defendant.* I have read all of this plea agreement and have discussed it with my attorney. I fully understand the plea agreement and accept and agree with it without reservation. I do this voluntarily and of my own free will. No promises have been made to me other than the promises in this plea agreement. I have not been threatened in any way to get me to enter into this plea agreement. I am satisfied with the services of my attorney with regard to this plea agreement and other matters associated with this case. I am entering into this plea agreement and will enter my plea of guilty under this agreement because I committed the crime to which I am pleading guilty.

3/2/05 /s/ Brian Michael Gall
Date BRIAN MICHAEL GALL
Defendant

34. *Defendant's Attorney.* I have read this plea agreement and have discussed in its entirety with my client. There is no plea agreement other than the agreement set forth in this writing. My client fully understands this plea agreement. I am satisfied my client is capable of entering into this plea agreement, and does so voluntarily of his own free will, and without any coercion or compulsion. I believe there is a factual basis for the plea and concur in my client entering into this plea agreement and in entering a plea of guilty pursuant to the plea agreement.

3/2/05 /s/ Marc Milavitz
Date MARC MILAVITZ
Attorney for Defendant

1733 Canyon Blvd.
Boulder, CO 80302
Tel: (303) 442-2166
Fax: (303) 440-4515

35. *United States of America.*

United States of America

Matthew G. Whitaker
United States Attorney

Date

Jason T. Griess
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ATTACHMENT A
STIPULATION OF FACTS

COMES NOW the undersigned Assistant United States Attorney for and on behalf of the United States of America, plaintiff in the above captioned matter, and defendant, BRIAN MICHAEL GALL, and defendant's attorney, Marc Milavitz, and hereby stipulate and agree that the following facts are true and correct and may be used by the Court to establish a factual basis for the plea of guilty to be entered by defendant pursuant to the plea agreement, and for purposes of sentencing:

1. That beginning by on or about February of 2000, and continuing to on or about September of 2000, the defendant, BRIAN MICHAEL GALL, entered into an agreement or understanding with others to distribute methylenedioxymethamphetamine (MDMA). The persons with whom the defendant agreed to distribute methylenedioxymethamphetamine (MDMA) include but are not limited to: Luke Rinderknecht, Theodore Sauerberg, Corey Coleman, Ross Harbison and Mark Goodding.

2. That the defendant, BRIAN MICHAEL GALL, voluntarily and intentionally joined the agreement or understanding, either when it was first reached or at some later time while it was still in effect.

3. That at the time the defendant, BRIAN MICHAEL GALL, joined in the agreement or understanding, he knew that the purpose of the agreement or understanding was to distribute methylenedioxymethamphetamine (MDMA).

4. That as part of the agreement or understanding the defendant, BRIAN MICHAEL GALL, distributed methylenedioxymethamphetamine (MDMA), obtained from Luke Rinderknecht and Theodore Sauerberg, to other individuals including but not limited to: Ross Harbison, Mark Goodding and Corey Coleman.

5. That at the time the defendant, BRIAN MICHAEL GALL, distributed quantities of methylenedioxymethamphetamine (MDMA) to Ross Harbison, Mark Goodding and Corey Coleman, he was aware that they intended to redistribute the methylenedioxymethamphetamine (MDMA) to other individuals.

6. That during the course of the conspiracy, the defendant, BRIAN MICHAEL GALL, was responsible for, but did not necessarily distribute himself, at least 2,500 grams of a mixture and substance containing methylenedioxymethamphetamine (MDMA), or the equivalent of at least 87.5 kilograms of marijuana.

7. That by on or about September of 2000, the defendant, BRIAN MICHAEL GALL, communicated his intent to stop distributing methylenedioxymethamphetamine (MDMA) to other members of the conspiracy including but not limited to Luke Rinderknecht and Mark Goodding.

8. That the defendant, BRIAN MICHAEL GALL, was aware that it is illegal to distribute methylenedioxymethamphetamine (MDMA).

9. That part of the conspiracy occurred in the Southern District of Iowa.

10. The defendant, BRIAN MICHAEL GALL, hereby certifies that the facts set forth above are true and accurate to the best of his knowledge.

3/2/05 /s/ Brian Michael Gall
Date BRIAN MICHAEL GALL
Defendant

3/2/05 /s/ Marc Milavitz
Date MARC MILAVITZ
Attorney for Defendant

Date Jason T. Griess
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

No. 04-116

UNITED STATES OF AMERICA
Plaintiff,

vs.

ANTONIO FERNANDEZ PEREZ, REYNALDO CORTEZ, SR., JESSE LEE CRAWFORD, BROOKS THOMAS ROBINSON, BRIAN MICHAEL GALL, THEODORE JOSEPH SAUERBERG, COREY ALAN COLEMAN, AND JAROD JAMES YODER,
Defendants.

DEFENDANT'S GALL'S SENTENCING MEMORANDUM

Comes now Defendant Brian Gall, by and through his attorney, Marc Milavitz, of the Alternative Law Office of Marc Milavitz, P.C., files the following Sentencing Memorandum setting forth all factors that the Court should consider in determining what type and length of sentence is sufficient, but not greater than necessary, to comply with the statutory directives set forth in 18 U.S.C. § 3553(a). Mr. Gall is a person who has a minimal criminal history, a person who was a drug user and lower level dealer for three months when he was in college, who was near the bottom rung of an ecstasy conspiracy and who a member of the conspiracy for a relatively short amount of time (three months) and dealt a relatively small amount of drugs, a person who voluntarily withdrew from the conspiracy over five years ago and a person who, for the past five years and while on pre-sentence supervision for the past ten months, has done extremely well in abiding by the law. Mr. Gall believes it would be

counterproductive to society as a whole as well as to his for the Court to imprison him and proposes that the Court sentence him to a term of probation so that he can continue as a law abiding citizen, business owner and a productive member of society.

Sentencing under *Booker*

On January 12, 2005, the Supreme Court ruled that its Sixth Amendment holding in *Blakely v. Washington*, 124 S. Ct. 2531 (2004) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) applies to the Federal Sentencing Guidelines. *United States v. Booker*, 125 S. Ct. 738, 756 (2005). Given the mandatory nature of the Sentencing Guidelines, the Court found "no relevant distinction between the sentence imposed pursuant to the Washington statutes in Blakely and the sentences imposed pursuant to the Federal Sentencing Guidelines" in the cases before the Court. *Id.* at 751. Accordingly, reaffirming its holding in *Apprendi*, the Court concluded that

> [a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. *Id.* at 756.[1]

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[1] It should be noted that the fact-of-prior-conviction exception to the Apprendi rule is based on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). But the continued vitality of this case and the exception it created has been called into question not only by the broad reasoning of Booker itself, which would seem to apply to all enhancement facts, including facts of prior conviction, but also more recently by *Shepard v. United States*, 125 S. Ct. 1254 (2005). *Shepard* sharply limits the *Almendarez-Torres* exception to the fact of prior conviction as determined by the judicial record, and excludes facts about the conviction which are not contained in such conclusive records. As Justice Thomas notes, moreover, five justices agree that *Almendarez-Torres* was wrongly decided. 125 S. Ct. at 1264 (Thomas, J., concurring).

Based on this conclusion, the Court further found those provisions of the federal Sentencing Reform Act of 1984 that make the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) or which rely upon the Guideline's mandatory nature, 18 U.S.C. § 3742(e), incompatible with its Sixth Amendment holding. *Booker*, 125 S. Ct. at 756. Accordingly, the Court severed and excised those provisions, "mak[ing] the Guidelines effectively advisory." *Id.* at 757.

Instead of being bound by the Sentencing Guidelines, the Sentencing Reform Act, as revised by *Booker*,

> requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a).

Booker, 125 S. Ct. at 757. Thus, under Booker, sentencing courts must treat the guidelines as just one of a number of sentencing factors set forth in 18 U.S.C. § 3553(a).

The primary directive in Section 3553(a) is for sentencing courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2." Section 3553(a)(2) states that such purposes are:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In determining the minimally sufficient sentence, § 3553(a) further directs sentencing courts to consider the following factors:

> 1) "the nature and circumstances of the offense and the history and characteristics of the defendant" (§ 3553(a)(1);
>
> 2) "the kinds of sentences available" (§ 3553(a)(3);
>
> 3) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct (§3553(a)(6); and
>
> 4) "the need to provide restitution to any victims of the offense." (§ 3553(a)(7)).

Other statutory sections also give the district court direction in sentencing. Under 18 U.S.C. § 3582, imposition of a term of imprisonment is subject to the following limitation: "in determining whether and to what extent imprisonment is appropriate based on the Section 3553(a) factors, the judge is required to "recogniz[e] that imprisonment is *not* an appropriate means of promoting correction and rehabilitation"" (emphasis added).

Under 18 U.S.C. § 3661, "*no limitation* shall be placed on the information concerning the background, character, and conduct of [the defendant] which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence" (emphasis added). This statutory language certainly overrides the (now-advisory) policy statements in Part H of the sentencing guidelines, which list as "not ordinarily relevant" to sentencing a variety of factors such as the defendant's age, educational and vocational skills, mental and emotional conditions, drug or alcohol dependence, and lack of guidance as a youth. *See* U.S.S.G. § 5H1. See also *United States v. Nellum*, 2005 WL 300073, 2005 U.S. Dist. LEXIS 1568 (N.D. Ind. Feb. 3, 2005) (Simon, J.)

(taking into account fact that defendant, who was 57 at sentencing, would upon his release from prison have a very low likelihood of recidivism since recidivism reduces with age; citing Report of the U.S. Sentencing Commission, Measuring Recidivism: the Criminal History Computation of the Federal Sentencing Guidelines, May 2004); *United States v. Naylor*, F. Supp. 2d, 2005 WL 525409, *2, 2005 U.S. Dist. LEXIS 3418 (W.D. a. Mar. 7, 2005) (Jones, J.) (concluding that sentence below career offender guideline range was reasonable in part because of defendant's youth when he committed his predicate offenses—he was 17—and noting that in *Roper v. Simmons*, 125 S. Ct. 1183, 1194-96 (2005), the Supreme Court found significant differences in moral responsibility for crime between adults and juveniles).

The directives of *Booker* and § 3553(a) make clear that courts may no longer uncritically apply the guidelines. Such an approach would be

> "inconsistent with the holdings of the merits majority in Booker, rejecting mandatory guideline sentences based on judicial fact-finding, and the remedial majority in Booker, directing courts to consider all of the § 3353(a) factors, many of which the guidelines either reject or ignore." *United States v. Ranum*, 353 F. Supp. 2d 984, 985-86 (E.D. Wisc. Jan. 19, 2005) (Adelman, J.).

As another district court judge has correctly observed, any approach which automatically gives "heavy" weight to the guideline range "comes perilously close to the mandatory regime found to be constitutionally infirm in Booker." *United States v. Jaber*,—F. Supp. 2d __, 2005 WL 605787 *4 (D. Mass. March 16,__ 2005) (Gertner, J.). See also *United States v. Ameline*, 400 F.3d 646, 655-56 (9th Cir. Feb. 9, 2005) (advisory guideline range is "only one of many factors that a sentencing judge must consider in determining an appropriate individualized sentence"), reh'g en banc granted, 401 F.3d 1007 (9th Cir. 2005).

Justice Scalia explains the point well in his dissent from Booker's remedial holding:

> Thus, logic compels the conclusion that the sentencing judge, after considering the recited factors (including the guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range. If the majority thought otherwise—if it thought the Guidelines not only had to be 'considered' (as the amputated statute requires) but had generally to be followed—its opinion would surely say so.

Booker, 125 S. Ct. at 791 (Scalia, J., dissenting in part). Likewise, if the remedial majority thought the guidelines had to be given "heavy weight," its opinion would have said so. The remedial majority clearly understood that giving any special weight to the guideline range relative to the other Section 3553(a) factors would violate the Sixth Amendment.

In sum, in every case, a sentencing court must now consider all of the § 3553(a) factors, not just the guidelines, in determining a sentence that is sufficient but not greater than necessary to meet the goals of sentencing. And where the guidelines conflict with other sentencing factors set forth in § 3553(a), these statutory sentencing factors should generally trump the guidelines. See *United States v. Denardi*, 892 F.2d 269, 276-77 (3d Cir. 1989) (Becker, J, concurring in part, dissenting in part) (arguing that since § 3553(a) requires sentence be no greater than necessary to meet four purposes of sentencing, imposition of sentence greater than necessary to meet those purposes violates statute and is reversible, even if within guideline range).

Application of the Statutory Sentencing Factors
to the Facts of this Case

In the present case, the following factors must be considered when determining what type and length of sentence is

sufficient, but not greater than necessary, to satisfy the purposes of sentencing:

1. The Nature and Circumstances of the Offense and the History and Characteristics of the Offender

(a) Nature and Circumstances of Offense

In this instance, Mr. Gall was purchasing relatively small to medium quantities of ecstasy for personal use as well as for resale for a limited period of time (three months) over five years ago while he was in college. In essence, he was at the either the lower middle portion or near the bottom of the conspiracy, and his only illegal activity was the possession, sale and use of ecstasy.

(b) History and Characteristics of Mr. Gall

> As noted in the presentence report, Mr. Gall is generally a law abiding citizen. Except for his underage drinking, open gun container (during a hunting trip) and the possession of marijuana case which was dismissed, his criminal history is devoid of any crimes. He did have issues revolving around substance abuse, however he has taken positive steps to address those problems and so far has successfully remained substance free. He is in a stable relationship with his girl-friend and all of his drug tests since his release to on pre-trial supervision have been negative. He has long ago disassociated himself with those in his past who have tended to stray and has committed himself to a clean, law abiding life style. He currently has his own business where he employees on a contract basis two individuals, is currently working on three jobs, has another four to five jobs lined up in the next three months and has bids out on other jobs. He pays his taxes and has a loving, supportive family network in Iowa and many friends and other who stand behind him. In sum, he

has lived an exemplary, law-abiding life since voluntarily withdrawing from the conspiracy and done extremely well while on pre-trial release.

2. The Need for the Sentence Imposed To Promote Certain Statutory Objectives:

(A) to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense

There is no doubt in Mr. Gall mind that what he did was wrong and against the law. However, he has vowed to never put himself in a position where there is even the possibility he may have to go to jail. If Mr. Gall is placed on probations, he is well aware that any relapse or future criminal conduct on his part will result in a prison sentence, something he does not wish to experience.

(B) to afford adequate deterrence to criminal conduct

A probation sentence does afford adequate deterrence to future criminal conduct by Mr. Gall. His voluntary with-drawal from the conspiracy as well as his behavior for the past five years demonstrates that he has learned his lesson. Additionally, he has responded very favorably to pre-trial supervision. This is evidenced from the reports of his pre-trial release supervisor, who has agreed with his moving to Iowa.

(C) to protect the public from further crimes of the defendant

Probation would be a sufficient safeguard for the public. Mr. Gall is not a violent person, there are no weapons involved and he is not a danger to anyone. It is anticipated that probation would carefully monitor and supervisor Mr.

Gall to protect the public from any criminal behavior or relapse on his part.

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner

The best method for providing Mr. Gall with substance abuse treatment and monitoring would by far and away be outpatient care that he could receive while on probation. It is undisputed that that there is a greater degree of flexibility and a wider variety of treatment programs available to Mr. Gall if he is not incarcerated then his treatment options if in prison. As stated above, Mr. Gall is not in need of punishment or separation from society; he is in need of monitoring and possibly treatment.

3. The Kinds of Sentences Available

In *Booker*, the Supreme Court severed and excised 18 U.S.C. § 3553(b), the portion of the federal sentencing statute that made it mandatory for courts to sentence within a particular sentencing guidelines range. *Booker*, 125 S. Ct. at 756. This renders the sentencing guidelines advisory. *Id.* Under 18 U.S.C. § 3561, this Court does have the discretion to impose a probation sentence for Mr. Gall.

4. The Sentencing Range Established by the Sentencing Commission

The probation department has calculated that Mr. Gall would have a total offense history of 19 points and the probation department calculating that Mr. Gall falls within criminal history I, resulting in a guideline provision range of a sentence of 30-37 months of incarceration. In this instance, the guideline range does not adequately reflect the Mr. Gall's conduct or personal history. Specifically, it fails to take into account the young age of Mr. Gall when this event took place, the short time he was involved in criminal activity and

the fact he voluntarily withdrew from the conspiracy. It also fails to take into account Mr. Gall's law abiding behavior since the time of this incident and his exemplary behavior before and since this three month window in his life. From all indications, this behavior was an aberration and not the norm. During Mr. Gall's short life, he has either worked or been in school, he has been an upstanding person and has been a person whom people are proud to call a family member, a friend or an employee and now an employer and businessman. Many people, including his family, the businesses he works with and hi employees depend on Mr. Gall, and he has proven himself worthy of this responsibility. None of these factors are taken into consideration by the sentencing guidelines.

Proposed "Statement of Reasons Pursuant to 18 U.S.C. § 3553(c)" for sentence below guideline range.

There simply is no reason to further incarcerate Mr. Gall and a multitude of reasons to place him on probation and allow him to continue being a productive member of society. As enunciated above, Mr. Gall has succeeded while on pre-trial release status. He has kicked his ecstasy habit as evidenced by graduating from college, starting and succeeding in his own business, employing others and clean drug tests. Mr. Gall has been either been in school or gainfully employed since his withdrawal from the conspiracy and has maintained a stable and drug-free environment. Probation would continue the supervision of Mr. Gall which was started by pre-trial release and make very effort to promote and encourage continued success for Mr. Gall. Mr. Gall's only criminal activity is one of a drug use and dealing and as long as he continues to remain substance free, he poses no threat to society or himself. Given the lack of criminal history, the nature of the crime itself, the rehabilitative efforts by Mr. Gall and his perfect compliance with pre-trial release, a probation sentence best fits this case and is appropriate for Mr. Gall.

Conclusion

For the foregoing reasons, Brian Gall respectfully submits that a sentence of 12 months probation to comply with the statutory directives set forth in 18 U.S.C. § 3553(a).

Respectfully submitted,

/s/: Marc Milavitz DATED: May 20, 2005

MARC MILAVITZ
The Alternative Law Office of Marc Milavitz, P.C.
Lawyer for Mr. Gall
1733 Canyon Blvd.
Boulder, CO 80304
303-442-2166
fax 440-4515

CERTIFICATE OF SERVICE

A photocopy of the foregoing GALL SENTENCING MEMORANDUM was mailed to the postage prepaid, on 20th day of May, 2005, to the following:

JASON GRIESS
United States Attorney
U.S. Court House and Annex
2nd Floor
110 E. Court Ave.
Des Moines 50309

KAREN DASSINGER U.S. Probation Officer
United States District Court
Southern District of Iowa
Des Moines, IA 50309

/s/: Marc Milavitz

11360 130th Street
Davenport, Iowa. 52804
May 15, 2005

Judge Pratt
US District of Iowa
110 East Court Avenue
Room 127
Des Moines, IA 50309-2052

RE: Brain Gall

Dear Judge Pratt,

I am writing to you in regards to the hearing for Brian Gall on May 27, 2005. Brian and I have been dating for the last 18 months. I can hardly believe that the man that I know was a person that would have ever been involved in any type of illegal behavior. Brian has only demonstrated strong family values, a committed work ethic, compassion to others and morals that I would look for in a man that I would be willing to spend the rest of my life with.

Most of the other individuals writing to you on Brian's behalf can share with you his contributions that he can make to the community or how he has changed on the outside. I have an opportunity to share with you the changes Brian has made on the inside. Brian has been honest from day one with me on his past actions that have placed him in this position that has been life altering. Brian has confessed many times that he is haunted by his mistake of being involved with drugs and how it has caused harm to the people he loves and how it has a much larger impact on those people he may never even meet.

Brian and I have planned a future together, and at this point a major part of that future is in your hands. Brian has confessed to me that he should be responsible for the harm and illegal acts he was involved in, but Brian has changed. He is strongly committed to learning from his mistake. Brian is a smart

business man and employer. He is a good son, brother, and uncle. Brian is also the man that I plan to spend the rest of my life with no matter what is placed before us. Please see him for the man he has become and let him continue to make a positive contribution to society. Brian has expressed his willingness to speak to others about his mistake and how it has impacted every aspect of his life. Give him the opportunity to promote change and make restitution, but do not label him for the rest of his life for one very poor mistake.

Sincerely,

/s/ Amy R Plett
AMY R. PLETT

Honorable Judge Pratt
C/O Karen Dassinger
110 E Court Avenue #127
Des Moines, IA 60309

Re: Brian Gall

Dear Sir,

I have been asked to give a reference for Mr. Gall, I am doing so without reservation. I have been working with Mr. Gall on several projects utilizing his construction services. I have been very impressed on how he conducts his business; he is prompted and honors his commitments. I have asked him if he would consider taking on some large projects for me but he came to me and explained that there were circumstances that would not allow him to make such a commitment at this time. I have many years of experience working with the construction labor industry, most folks would of not have been so honest with me and would of excepted the offer. If his situation does not go well for him this would have left me and others high and dry. He thought of others rather than his own well being by turning down my offer.

I know that I very much would like to continue working with him if the situation will allow it. To find people such as Brian with his integrity is truly hard in the construction industry. I truly hope the best for Mr. Gall.

If I can be of any further assistance to help for a positive result for Mr. Gall, please call on me.

Towncrest Plaza LLC
Michael L. Glick
1708 Newberry Avenue NE
Solon, IA 52333
319.624.1394

Honorable Judge Pratt
C/O Karen Dassinger
110 E Court Avenue #127
Des Moines, IA 60309

May 9, 2005

Re: Brian Gall DBA BMG Construction Service

Your Honor,

My name is Mark Anderson and I am writing in my capacity as the Retail Replacement Sales Manager for Prairie Pella Incorporated of Des Moines Iowa. I have been responsible for sub contracting installation of windows and doors with BMG Construction Service. In this business relationship beginning December of 2004 to the present, I have found the owner Brian Gall to be Reliable, Honest, Friendly, and Polite.

Should you wish to speak to me, regarding Brian's character, I can be reached at 309-678-5459.

Mark A. Anderson
Pella Windows and Doors
Retail Replacement Sales Manager 725/730
Mobile 309-678-5459
E-Mail maanderson@129.pellapdsn.com

[LOGO]

DATE: 05-10-2005

TO: JUDGE PRATT C/O KAREN DASSINGER
110 E COURT AVE ROOM 127
DES MOINES, IA 50309

FROM: FRED NOVY, PELLA COMMERCIAL SALES

RE: LETTER OF REFERENCE FOR BRIAN MICHAEL GALL

DEAR JUDGE PRATT:

I HAVE KNOWN BRIAN GALL PROFESSIONALLY SINCE THE SUMMER OF 2000. HE WAS EMPLOYED AS A WINDOW INSTALLER. AT THAT TIME, HIS JOB PERFORMANCE WAS EXEMPLARY. HE FINISHED HIS WORK ON TIME AND WAS POLITE AND COURTEOUS TO BOTH CUSTOMERS AND FELLOW WORKERS. WHEN HE MOVED TO ARIZONA IN THE FALL OF 2002, I GAVE HIM A POSITIVE WORK REFERENCE, WHICH HELPED HIM SECURE A POSITION AS AN INSTALLER FOR OUR PELLA WINDOW AFFILIATE IN TEMPE, ARIZONA. HE RETURNED TO IOWA IN 2004, CONTACTED ME AND AGAIN BEGAN TO INSTALL WINDOWS FOR MYSELF, OTHER PELLA SALESMAN, AS WELL AS LOCAL AREA CONTRACTORS. HE CONTINUES TO DEMONSTRATE A SUPERIOR WORK ETHIC, AND IS A VALUABLE RESOURCE FOR MY BUSINESS. WITH THE START OF THE SPRING BUSINESS CYCLE I HAVE CONTRACTED WITH BRIAN TO COMPLETE AT LEAST EIGHT WINDOW AND DOOR RELACEMENT JOBS IN IOWA CITY, DAVENPORT, CEDAR RAPIDS, AND THE SURROUNDING AREA. BRIAN AND I ARE CURRENTLY WORKING TO LAND A LARGE WINDOW AND DOOR REPLACEMENT PROJECT ON THE

CAMPUS OF NORTHWESTERN UNIVERSITY, EVANSTON, ILLINOIS. THIS PROJECT IS TO START IN JUNE OF 2005 AND BE FINISHED IN LATE AUGUST, AND BRIAN'S PRESENCE WILL BE CRITICAL.

BRIAN IS AN INTEGERAL AND QUALIFIED MEMBER OF OUR TEAM AND FINDING A SUITABLE REPLACEMENT FOR HIM WOULD BE VERY DIFFICULT. I WOULD ASK THAT YOU ALLOW HIM TO REMAIN AS AN INDEPENDENT CONTRACTOR FOR WINDOWS BY PELLA INC.

SINCERELY,

FRED NOVY, PELLA COMMERCIAL SALES

/s/ Fred Novy

Honorable Judge Pratt
U.S. District Court, Southern District of Iowa
Room 127
110 E. Court Ave
Des Moines, IA 50309-2052

Judge Pratt:

We are writing to provide you with a perspective on Mr. Brian Gall, a defendant in a case presently under your review. Our perspective is probably different than the view of Mr. Gall that arises out of courtroom proceedings alone.

Brian is the son of Tom and Vicki Gall, good friends of ours from our church. It is in the church environment that we first met and became acquainted with the Galls. Tom and Vicki provide strength, compassion, and support to us and to their fellow parishioners. Their family life reflects the same values. While it is always possible that a child will wander from home, both geographically and from family teachings, like the prodigal son in Scripture, we have found that where the roots are strong, the child returns to the family and its values.

Brian has been operating his own construction and remodeling business, BMG Construction, for well over a year now. I have seen Brian hard at work, well after normal business hours, sitting at his parent's kitchen table working through the mountain of paperwork necessary to a small business. I have seen him working on the job. Construction is not glamorous, nor easy, but it is good work, and Brian has been slowly building a clientele base. He is also building a base of business associates with whom he can combine or trade work and jobs to smooth the workflow for both his associates and himself.

I most recently saw Brian working with the Rebuilding Together volunteer team from our church, as he led the work to salvage the ceiling of a kitchen in a nearly 100-year old home by installing sheetrock, one of his talents. The home belonged

to a grandmother raising her granddaughter who lacked the resources to maintain the house.

In short, we believe that Brian has the family background, and the present direction and dedication to be a responsible, respected citizen of the community. We have no personal knowledge of the details of the situation that brought Brian to your court room, but we have the strong belief that society would best be served by his returning to his business to try to grow it into a business that will, with his continued hard work, serve him, any future family of his, and his community.

Sincerely, /s/ Bernie Leach
/s/ Glenn Leach
GLENN AND BERNIE LEACH
4705 Ripley St.
Davenport, IA 52806-4127

909 Heiler Court
Eldridge, IA 52748
April 27, 2005

Judge Pratt
U.S. District Court
Southern District of Iowa
110 East Court Ave.
Room 127
Des Moines, IA 50309-2052

Dear Sir:

We are writing in regard to a case you will be hearing on May 27, 2005, concerning Brian Gall.

We have known Brian for thirteen years; since we became friends of the Gall family. We know that Brian has had some difficulties and made some poor choices in his past., as we are close friends of his parents, Tom and Vicki Gall.

Brian has really made efforts to "turn his life around" in the last few years. We know that he felt the need to distance himself from some of his unsavory friends and their practices, so he moved to Colorado to start his own business a couple of years ago. He has worked very hard to make a success of this business, and continues to do so here in Iowa. He has asked his family, parents and friends to pray for him, which is indicative of a desire to improve his life and the quality of his life.

We know that Brian regrets decisions made in his younger years, and has truly made great efforts to become a better citizen.

Thank you for your consideration of our letter.

Sincerely,

Michael McKenna
Jennifer McKenna

Eric Waddell
Sales Manager
Pella Windows and Doors
800 2nd Street
Coralville, IA 52241

Judge Pratt,

I am writing in regards to an upcoming sentencing for Brian Gall. I have been working with Brian for the last year. His company has been installing windows for us during that period. Brian has been doing 2-3 jobs per week over that time period. He has been the best installer I have had in the 4 years I have been here. He is courteous and professional and his work is top notch. He is a great value to our organization.

On a personal note, Brian has told me the situation that he has gotten himself into and he realizes that he has done wrong and has really changed his lifestyle. He works hard to make a living in an honest manner. I feel that Brian is a real asset to society.

Please keep these points in mind during sentencing.

Thanks for your time,

/s/ Eric Waddell
ERIC WADDELL
Pella Sales Manager

May 15, 2005

Judge Pratt
US District Court
Southern District of Iowa
110 East Court Avenue
Room 127
Des Moines, IA 50309-2052

Dear Judge Pratt:

RE: Brian Gall

I am writing on behalf of my son, Brian Gall and his upcoming court appearance for sentencing on May 27, 2005.

Just over a year ago when Brian told us of the trouble he had gotten himself into, I was devastated. I was full of anger and a sense of failure as a parent.

My wife and I asked ourselves what we had done wrong in raising Brian. We came to realize that what he had done was not fault of our own. Whether it was peer pressure of college influences or a sense of being invincible, Brian made some bad choices.

Brian soon realized what he was doing was very wrong and quit. After graduating from college Brian moved away to distance himself from the people who got him involved. After Brian was arrested he came home to the support of his family and friends.

Meanwhile, Brian has worked very hard to establish his own business. Brian installs windows for the Pella Window Co in the Quad Cities as well as Iowa City and Cedar Rapids. He also does remodeling, siding, decks and much more. His business has grown to the point that he has had to hire additional help. Brian is working very hard to become a successful and respected business man.

I am very proud of Brian's accomplishments and how he as turned his life around.

What Brian did should not go unpunished. However I'm asking you to consider extended probation time and community service rather than sending Brian to jail. Thank you.

Respectfully,

Tom Gall
Brian's Father

May 14, 2005

Judge Pratt
c/o Karen Dassinger
U S District Court
Southern District of Iowa
110 East Court Avenue, Room 127
Des Moines, IA 50309-2052

Re: Brian Gall Support:

Dear Judge Pratt

I am writing to you today on behalf of Brian Gall; who he is today, not the mistakes he has made in the past.

My family and I have been acquainted with the Gall's for over 10 years; however, it's only been in the past five years that my acquaintance with Brian's parents Tom & Vicki has grown into a closer friendship. So yes, our close circle of friends are very aware of the parental devastation when Tom & Vicki shared Brian's past bad judgment and his legal troubles.

As a parent of a son and daughter, around Brian's age, I immediately put myself into their role and wondered what if it was my child facing these challenges. As a parent, we can only hope to protect our children from hurts and help them avoid the stumbles and troubles; however, when a bad decision is made, it can't be undone, so we can only unconditionally love them even though we are gravely disappointed in them. We go through all the emotions of hurt, anger, questioning, and then realize the past is just that—we can only go forward, so lean on prayer to give us the hope and strength.

The legal system shares both adherence to the laws and about reforming those who have made bad choices, to again be productive citizens. This is why I want to focus on who Brian is today.

I believe that Brian has demonstrated the best lesson of life: working hard always has more rewards than taking the easy road. He has taken the risk to stand on his own, to start his contracting business. Running a business is about credibility and trust. He has to be able to conduct business with a variety of individuals and businesses, be able to demonstrate his head and hands knowledge of the business, negotiate a fair price and then deliver and stand behind quality prŏduct and workmanship.

I encourage you to consider, within your flexibility of assigning responsibility for wrong doing, that the best solution would be to allow Brian to function within society and to continue his business demonstrating his ability to be reformed by his own self knowledge of right choices.

If a punishment is mandated, rather than jail time, perhaps a better punishment would be for Brian to do hours of community service:

- work with his construction abilities such as working on a Habitat Home,
- or build park playground equipment,
- or something that could benefit many individuals,
- or speak with students about the lessons he learned, anything that sounds too good, really is bad— working hard is where the greatest value resides.

No matter the outcome, we will stand beside the Gall family in friendship and faith. Thank you for allowing the opportunity to share my personal thoughts with you.

Sincerely,

/s/ Deborah S. Stillwell

DEBORAH S. STILLWELL
3219 S. 26th Avenue
Eldridge, IA 52748
563-285-8242

630 S. 10th Street
Eldridge, IA 52748

May 16, 2005

Judge Pratt
US District Court
Southern District of Iowa
110 East Court Avenue
Room 127
Des Moines, IA 50309 -2052

RE: BRIAN GALL
Court Date May 27, 2005

Dear Judge Pratt,

This letter is written on behalf of my nephew through marriage, Brian Gall. This young man has shown to me that he can be an upstanding contributing member of society. His work ethic at job sites is as good as any man I have worked with. His knowledge of tools and his carpentering trade are very impressive. Once he secured enough money from his window replacements and general construction jobs, he purchased a cube van and fixed it up to be his work truck.

Brian is very conscientious and very thoughtful. He rents from me and has saved me many headaches with his general knowledge for fixing the little problems that come up with any household, from plumbing to electrical.

When he started making money from his jobs he didn't waste it, he is pouring it back into his business in the form of bettering and purchasing more tools and the aforementioned cube van.

To send this fine young man to prison would serve no good purpose. I am certain that he will continue with his productive life and make us all proud of him.

Thank You,

/s/ Michael C. Meyer

Deb Lamp
5806 N Pine
Davenport, Iowa
52806

April 28, 2005

Honorable Judge Pratt
U.S. District Court
Southern District of Iowa
110 East Court Ave. Room 127
Des Moines, Iowa 50309-2052

Honorable Judge Pratt;

I am writing you on behalf of Brian Gall who will come before you for sentencing in May. I hope that you will consider where Mr. Gall is at now in his life as compared to at the time of his choice of behavior. He has gone on to make many positive changes in his life and become a productive citizen in society. I have worked in the field of corrections for 15 years and in substance abuse for 8 years and have seen many people come along with similar poor choices. I do believe that justice will not be served with going to prison for this young man. He has made positive changes in his life at this time; going into the prison system many times makes a person bitter. The bitterness coming from the negative impact that prison can make with those that are making progress in their life. Brian has made the changes that come with recovery and maturity; he is now a productive person in business. I would be fearful that a prison sentence would make a very bitter person and negate any positive changes he has made for himself and society. Working in the substance abuse area we do not see enough of the positive turnaround that Brian has made in his life. The prison system though is to be a penalty for the crime is many times a huge negative impact on the individual. I am sure that you know what I am talking about with the prison system.

I pray that you will take into consideration where this young man is today when you decide on the penalty for his choices. I pray that you will consider probation for him so that he will be able to continue to be a productive person in our society.

I write to you on behalf of this young man but also from my experience in the field of corrections and substance abuse. I pray you will take this into consideration. Thank you for your time in this matter.

Sincerely;

Deb Lamp

May 5, 2005

Judge Pratt
US District Court
Southern District of Iowa
110 East Court Avenue, Room 127
Des Moines, IA 50309-2052

Dear Judge Pratt:

I writing to you in regards to the hearing for Brian Gall on May 27, 2005. I am Brian's sister, so of course I am in support of him. However, the reason for my support goes way beyond the fact that we are related.

We grew up in, and continue to have a very close, loving, Christian family. Our family has grown larger in size and some have moved away but we continue to remain very close and cherish our time together. Brian is a fun and loving brother and especially has been a wonderful uncle to my young children, as he has developed a close relationship with them as well.

It is my belief that Brian got caught up with the wrong group of people when he was in college at the University of Iowa. He made some very stupid mistakes and now readily admits that. Despite the terrible mistakes that he did make, he de-cided to leave the state and this group of people to get away from it all and start a career after school. I can remember Brian has always said he was going to own his own business someday. After gaining experience in various areas of construction, he has returned to living in Iowa and his dream is now a reality and he has started his own construction business. He is so proud of this and will eagerly talk to anyone about the work he does. His schedule is always filled with jobs and he has already grown to the point of needing to hire additional employee(s).

Brian has shown the good person that he is in many different ways as well. Despite the probation, hearings, shame and financial setback he has suffered from this terrible experience, he has not let himself give up. As you can tell, he has continued to work hard to reach his life goals. He is a very caring and helpful person and has given of himself in many ways. One example of this is his recent giving of his time and talents to volunteer for a Rebuilding Together (formerly Hearts and Hammers) project organized by our father and members of our family's church.

I would agree that Brian made a huge mistake back when he was in college, but I truly believe he has learned his lesson and grown from this mistake. He truly is a good person and I feel that any harsher punishment such as jail time would bring him down. He has shown himself to be an important family and community member and through this I feel he has grown closer to God as well. Also, the business he has worked hard to establish, as well as his many customers, would suffer significantly if Brian were not able to continue his work at the capacity he is now.

I ask that you please consider these thoughts when making your final decision in determining Brian's future. Thank you for your consideration.

Sincerely,

/s/ Kerri Hanna
KERRI HANNA AND FAMILY

630 South 10th Street
Eldridge, IA 52748
April 26, 2005

Judge Pratt
US District Court
Southern District of Iowa
110 East Court Avenue
Room 127
Des Moines, IA 50309-2052

RE: BRIAN GALL

Dear Judge Pratt,

Brian Gall is a good man, but made a stupid mistake 5 years ago; he was a college student, living with bad influences. He got out of this bad situation, and realized on his own, it was wrong and didn't want to be involved. Jail could destroy this human being Brian is becoming.

Since knowing his act was wrong and wanting to change his ways, Brian has grown as a responsible important person to our society. He went from a college kid to a fine adult who wants to do the good things in life. We all make some bad choices in our life, but shouldn't something be said for someone who tries to fix the bad choices, which is what Brian has done.

Brian is paying the price for his mistake everyday since the law has been involved. All this time and money, has taken a toll on him and all whom love him, wondering what is going to happen, and all along he is still trying to be positive about this and trying to make a good life for himself. He isn't sitting around waiting for a decision; he is trying to reach his goals, and hoping that the courts will have mercy on him.

Brian comes from a well-balanced loving Christian family. I am his aunt, and I believe he is truly sorry. I am letting him live with my daughter in Iowa City at our house. I would not

jeopardize my daughters safety for anyone or anything, but because I know Brian is a different person and has really changed his ways I am letting Brian live there to help him out, and to be with loved ones. My daughter and Brian are very close. She is attending Iowa right now. They have been good for each other during this ordeal.

Brian, as long as I can remember has told me he wanted to own his own business. He knew he needed a college education, and graduated with a degree. He started his own business. By talking with Brian you can see his excitement in how his company is growing already. There are a lot of people counting on Brian to provide his services in the construction business. My husband has had chances to work with Brian and told me that he is a very hard, knowledgeable worker.

He knows he is forgiven by God and is trying to be the best he can be. We are all sinners, but God forgives us all if indeed we are truly sorry for our mistakes. Brian has all the love and support from his family. We are all praying that the courts will see that Brian is truly needed by the community and his family and friends and it would not serve any purpose to send him to jail.

Respectfully,

/s/ Cheryl A Meyer
CHERYL A MEYER
Brian's Aunt

May 15, 2005

Judge Pratt
US District Court
Southern District of Iowa
110 East Court Avenue
Room 127
Des Moines, IA 50309-2052

Dear Judge Pratt:

RE: Brian Gall

I am writing in reference to the upcoming sentencing hearing for my son, Brian Gall on May 27, 2005.

I am asking for leniency in Brian's case. I see no advantage to putting him in jail; he has made the changes in his life to be a better person for himself and for society. I believe it could do more damage by putting him in jail for something that happened five years ago and for such a short time. He has started his own business and it is really starting to take off. By putting him in jail at this point I believe his business will suffer and very possibly fail. People are counting on him to do jobs for him. He now has two employees that also count on him for work. Isn't what society really wants Brian to do is to change his life for the better?

He has changed his life. This was a short term college event. He decided on his own to change and did not want to continue with that life choice. He graduated from college and moved to Arizona and then to Colorado to get distance from the situation and bad influences to start a new life. When this situation came to a head last June, he came back home to Iowa to have the support of family. Up until that time he had some apprehension about going full force into starting his own business. Once he came to Iowa he decided to make a go of it and he is doing fantastic. He loves what he is doing and shares his business with us with excitement. He chose Iowa

City instead of his hometown in the Quad Cities because his girlfriend is in Iowa City. He is 45 minutes from his hometown so we see him often. He has been on probation for almost a year and I believe he has had good reports and has been cooperating with the authorities completely. He has been putting off some major decisions about his life in the past year because of this situation not being settled.

He has the support of family. We love him very much. We know what he did was stupid and he also knows it was stupid, and we were very naïve not knowing it was happening as I am sure many parents are. But it did happen. He is trying to put the whole episode behind him and move on. I pray the courts to have mercy and allow him to do this. I beg you to let Brian continue on with his life to be successful and an asset to society instead of allowing a jail sentence which could very well destroy his business, self esteem and the person Brian has become today.

Sincerely,

Vicki Gall
Brian's Mother

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

No. 4:04-CR-116

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BRIAN MICHAEL GALL,
Defendant.

SENTENCING TRANSCRIPT

Courtroom, Second Floor
U.S. Courthouse
123 East Walnut Street
Des Moines, Iowa
Friday, May 27, 2005
1:35 p.m.

BEFORE: THE HONORABLE ROBERT W. PRATT, Judge.

APPEARANCES:

For the Plaintiff: JASON GRIESS, ESQ.
Assistant U.S. Attorney
U.S. Courthouse Annex
110 East Court Avenue, Suite 286
Des Moines, Iowa 50309-2053

For the Defendant: MARC MILAVITZ, ESQ.
Marc Milavitz Law Office
1733 Canyon Boulevard
Boulder, Colorado 80302

KELLI M. MULCAHY - CERTIFIED SHORTHAND REPORTER

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WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
For the Defendant:				
Tom Gall	10			
Vicki Gall	12			

[3] PROCEEDINGS

THE COURT: Please be seated.

Good afternoon.

Mr. Gall, have you had the opportunity to read the report in this case?

THE DEFENDANT: Yes, I have, sir.

THE COURT: And did you have enough time to talk to your lawyer about the report?

THE DEFENDANT: Yes.

THE COURT: You can remain seated.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Milavitz, did you have the opportunity to read the report in this case and talk to the defendant about the issues before me here?

MR. MILAVITZ: I did, Your Honor, yes.

THE COURT: All right. Mr. Milavitz, you wrote—I wanted to make sure I had the facts down here. I have your objection letter, which came on the 19th of May. I notice that paragraph 59, you say—I'm referring to your letter of May 19th, you say, paragraph 59, "Mr. Gall lived in Mesa, Arizona, for approximately one year, not three months." That has not been changed. How long did he live there?

MR. MILAVITZ: He did live there for one year, Your Honor.

THE COURT: Okay. And then—

[4] MR. MILAVITZ: I'm sorry to interrupt. It's one year and three months.

THE COURT: One year and three months?

MR. MILAVITZ: Yes.

THE COURT: Okay. And then on the paragraph 84, you say, under "Home Mortgages," that, "This is a vacation home in the Lake of the Ozarks which Mr. Gall owns along with five others." You say he contributed a relatively small amount of money. What's his equity in the place?

MR. MILAVITZ: I do believe it's about $2,500, Your Honor.

THE COURT: And then lastly, you say, paragraph 85, personal liabilities, "You omitted a personal loan Mr. Gall owes his parents." Is that 25,000 for legal expenses?

MR. MILAVITZ: Yes, Your Honor.

THE COURT: Okay. I didn't see anything in Ms. Dassinger's summary about his assets and liabilities. Is he paying that back?

MR. MILAVITZ: The $25,000?

THE COURT: Yes.

MR. MILAVITZ: Your Honor, he has not started to do that. That was something that was between he and his parents that he was going to determine— I mean, I guess if he goes to prison, it would be very difficult for him to start paying that back.

[5] THE COURT: Right. Is he going to pay it back?

MR. MILAVITZ: Yes.

THE COURT: Okay. Thank you very much. Mr. Griess, have you read the report in this case?

MR. GRIESS: I have, Your Honor..

THE COURT: All right. Mr. Griess, from the Government's standpoint, can you tell me, are there any factual issues I have to resolve?

MR. GRIESS: I don't believe so.

THE COURT: All right. Mr. Milavitz, do you know, from the defendant's standpoint, are there any factual issues I have to resolve?

MR. MILAVITZ: From my read, Your Honor, of what I wrote to the probation department and the changes I think were okay, except for the same issue of this alias— Again, I asked Mr. Gall about this alias, and he had no idea why the Iowa Department of, I guess, Public Safety, or whoever the law enforcement people, have this down on his records as having an alias. He's never gone by any other name.

THE COURT: All right.

MR. MILAVITZ: So we're thinking that that's maybe a mistake on their part.

THE COURT: All right. Mr. Milavitz, I read—talking about the age of the defendant here, I read of his substance abuse treatment, which—treatment problem, which apparently has [6] gone on for a long time, and I didn't see any reference to the treatment that he had, I believe the record reflects, in March of 1995 while he was in high school. I asked Ms. Dassinger about that. She had no records involving that. Does he have a juvenile record?

MR. MILAVITZ: Your Honor, not that he is aware of, no.

THE COURT: Okay. Why did he get ordered to treatment at age 16?

MR. MILAVITZ: Your Honor, when Mr. Gall was 16, he was involved in an automobile accident, and under the zero tolerance law, I believe, of the state of Iowa, he had some

alcohol in his system, and, as part of that, he was ordered to undergo treatment.

THE COURT: By?

MR. MILAVITZ: By the courts, I guess. I don't think that it resulted in him having a record. I believe he just had to undergo that treatment.

THE COURT: Okay. Mr. Gall, I have a hard time concluding. When did you meet Mr. Rinderknecht?

THE DEFENDANT: In February of 2000 or—

THE COURT: Okay. The report tells me he came to your apartment in '98 and '99 and on six occasions brought cocaine, which he shared. When did you meet Mr. Rinderknecht?

THE DEFENDANT: I met him in February—within a month [7] or two of February of 2000. I— He was dealing with other people in my apartment, but there was a lot of people going in and out, and—

THE COURT: Well, is the report wrong?

THE DEFENDANT: Was he in my house? He could have been.

THE COURT: No, no, no. Did people in your house share cocaine with Mr. Rinderknecht on six occasions in '98 and '99?

THE DEFENDANT: Not that I know of.

THE COURT: Ms. Dassinger, is that from discovery?

PROBATION OFFICER DASSINGER: That's from discovery, sir.

THE COURT: Mr. Griess, do you know anything about this defendant's involvement in '98, '99 that's contained in the report?

MR. GRIESS: Your Honor, without looking specifically at what Mr. Rinderknecht said, I do recall Mr. Rinderknecht discussing the fact that he had general knowledge of the group of individuals that lived at a house that I believe Mr. Gall was also residing at, and that, in addition to small quantities of Ecstasy and user quantities of cocaine—-or I guess those two drugs he would sometimes deliver to that residence for that use and for the group's use.

THE COURT: Okay. Now, Mr. Griess, you can tell me, [8] because you've got extensive knowledge of the case, more than I do, even though I heard the testimony during Mr. Cortez Sr. and Mr. Crawford's trial.

I asked Ms. Dassinger this. When one sells Ecstasy, do you sell it in quantities— The report doesn't tell me this, and that's why I think I need to know this. Do you sell it in quantities of two or three, if you are a seller to a consumer? Do you sell it in five or ten, or how many Ecstasy pills, if you're a dealer, do you sell to a user?

MR. GRIESS: If you're selling to a user, Your Honor, I mean, the answer is it could vary, the ranges, if you're selling to a user.

For instance, in this case, there was discussion in the facts that sometimes the individuals who were selling would go to bars and they would sell pills for anything from 20 to 30 dollars a pill at a local bar. In addition to that, the people who were charged and convicted in federal court were selling to people who were then also selling.

THE COURT: Right. But those were dealers that you prosecuted when—You know, there are a whole bunch of pills in this case, and I'm trying to think in my own mind, I know the marijuana equivalency is 87 kilograms, and the numbers just get away from me when you talk about the numbers of pills.

But from a dealer to a user, what you're telling me is it can be anywhere from two to three to ten?

[9] MR. GRIESS: Certainly. Absolutely.

THE COURT: All right. Thanks very much. Mr. Milavitz, do you want to put on some evidence? My law clerk said that you had intended to.

MR. MILAVITZ: I do, Your Honor. Both of Mr. Gall's parents, Tom Gall and Vicki Gall, would like to make statements to the Court, if they could, please.

THE COURT: All right. You may proceed.

MR. MILAVITZ: Thank you very much. I'm going to call Tom Gall, please.

Would the Court prefer me to stand at the podium or back here? It's going to be mostly a narrative statement.

THE COURT: Oh, he's going to make a statement or give testimony?

MR. MILAVITZ: Just— Well, make a statement, and I've never done a sentencing in this court so I don't know how you wish—

THE COURT: Well, I prefer the lawyer to be at the podium and the witness in the chair.

MR. MILAVITZ: That's fine.

THE COURT: Okay. And, Mr. Milavitz, you've never had the idiosyncrasies of me—Mr. Griess has had to tolerate me—but I prefer you refer to the witnesses by the last time when we're having fact-finding proceedings.

MR. MILAVITZ: Thank you very much, Your Honor.

[10] TOM GALL, DEFENDANT'S WITNESS, SWORN.

THE COURT: You may proceed, counsel.

MR. MILAVITZ: Thank you very much.

DIRECT EXAMINATION

BY MR. MILAVITZ:

Q. Could you please state your name.

A. My name is Tom Gall.

Q. Mr. Gall, where do you reside?

A. I live in—at 84 Park View Drive in Eldridge, Iowa.

Q. And are you related to Brian Gall?

A. Yes, I am. His father.

Q. Are you related to Brian Gall?

A. Yes, sir.

Q. How are you related to him?

A. I'm his father.

Q. Did you wish to make a statement to the Court today. regarding the sentence that Brian Gall should receive?

A. I do.

Q. Could you please make that statement at this time.

A. I will.

THE WITNESS: Your Honor, I know that what Brian did was wrong. It was very wrong. I've seen the change he's made in his life. What he did made me mad. I'm ashamed of the fact that what he did was very wrong, but he realizes that, I know he does, and I've seen the changes he's made.

[11] He's started his own business. He's doing very, very well. He's got people that rely on him now. He's grown to the point where he's supporting a couple of employees. He's got contractors that count on him for his expertise.

And I know that what he's done shouldn't go unpunished, but I would ask that you let him continue to work at his business. I think he's a greater asset to the community than—in this—in his job and his work that he does, and just—just the fact that a lot of people depend on him.

As family members, of course, we would be devastated. He's got a young lady that's—he's very involved with and loves very much. And I'd just—I'd just hate to see him go to jail at this time, Your Honor.

THE COURT: Okay.

BY MR. MILAVITZ:

Q. Mr. Gall, I want to touch on a couple of other issues, if could, please. One is the issue of the loan that Brian Gall has from you. How are you employed, sir?

A. I'm a mechanic for the Pleasant Valley Community School District in Pleasant Valley, Iowa.

Q. And your wife, how is she employed?

A. My wife is a secretary for the Scott County Extension Service, a part-time secretary.

Q. And in making this loan to Mr. Brian Gall, do you expect or need that loan to be repaid from him?

[12] A. I definitely need that loan to be repaid, and I expect it to be repaid.

Q. This was not a gift to him?

A. It's not a gift.

MR. MILAVITZ: I have nothing further. Thank you, Your Honor.

THE COURT: Mr. Griess?

MR. GRIESS: I have no questions.

THE COURT: You may step down.

(Witness excused.)

MR. MILAVITZ: Your Honor, I would next call Ms. Vicki Gall.

VICKI GALL, DEFENDANT'S WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. MILAVITZ:

Q. Could you please state your name.

A. Vicki Gall.

Q. And where do you live, Ms. Gall?

A. 84 Park View Drive in Eldridge, Iowa.

Q. And are you related to Brian Gall?

A. Yes, I am.

Q. And are you his mother?

A. Yes.

Q. Ms. Gall, you and Mr. Gall have made a loan to Brian for the purposes of legal representation; is that correct?

[13] A. Yes, we have.

Q. Do you expect or need that loan to be repaid?

A. Yes, we do.

Q. Can you please tell the Judge why.

A. Well, because I don't think we should just, you know, let him have free money and be able to just—I don't know, to pass this off and figure—you know. Plus, you know, it was quite a bit of money, and we took it out of some savings, and we need to have it back.

We've told him to wait until he—In case he did go to prison, he would have to—somebody would have to pay his

bills at the time, so we didn't push him, but as soon as this is over, he will have to start paying us back.

Q. Would it put you in a financial bind if that loan was not repaid?

A. Yes

Q. Ms. Gall, you've asked to make a statement to the Court today regarding Mr. Brian Gall's sentence. Can you please make that statement at this time.

THE WITNESS: Brian—Your Honor, Brian, I think, you know, I believe he realizes and we know he made a stupid mistake. It was very stupid. He's probably one of the first ones to tell you that. But I do believe that he's really learned from it.

In the last year since we've been going through all [14] this, we've had a lot of support from family and friends, and we've watched him grow. He comes from a loving and Christian family, and I think some of those values are coming back now, and, you know, he's become more mature and grown up.

And I just think at this time that, you know, if he went to jail, a lot of things could mess up for him in his life, you know, his business. And I just don't see any value in putting something—someone in jail that is already making those changes, which is what, I believe, the system would want him to do anyway, is to make those changes.

MR. MILAVITZ: Thank you very much.

THE COURT: Mr. Griess?

MR. GRIESS: No questions.

THE COURT: You may step down.

(Witness excused.)

MR. MILAVITZ: Your Honor I have a statement to make. It's more of a legal argument than anything else, just to add a few touches to what I've already filed with the Court.

THE COURT: All right.

MR. MILAVITZ: And I know that Mr. Gall wishes to make a statement to the Court too, and I don't know which order you want to have—

THE COURT: I have the defendant allocute after I hear from you about what the appropriate sentence is and after I hear from the Government what they think the appropriate [15] sentence is. Then I let the defendant make his allocution.

MR. MILAVITZ: Thank you very much, Your Honor. Your Honor, in preparing for this hearing today, I've done a lot of thinking on how best to approach the Court regarding Mr. Gall, and I think there's only one way to do that, and I think what the Court—what we're asking the Court to do is to look at the totality of circumstance of Mr. Gall's life.

I believe—and although it may not fit under the pure statutory interpretation as found in the U.S. Sentencing Guidelines of 5K2.20 regarding aberrant behavior, I believe that this incident or these series of incidents for three months out of Mr. Gall's 26 years were aberrant behavior.

I have seen everything and talked to Mr. Gall, his family, his friends, his girlfriend, and from what everybody has told. me and I think what's evidenced from the letters that the Court has received—and those people know Mr. Gall far better than I do and far better than, you know, you do, because you've only seen him very little—I think that shows that Mr. Gall is basically a very good person. He's a responsible person. He's a positive member of our community.

He's somebody who is definitely not in need of rehabilitation because he's done an admirable job of rehabilitating

himself. This is a circumstance where you're looking at a three-month window of his life.

[16] THE COURT: Counsel, I've got to tell you, I don't know where it says three months. My report says seven or eight. Does yours say three?

MR. MILAVITZ: I believe that he was involved in the from about June through August or—

THE COURT: Mine says seven or eight. Where does ii say three months?

MR. MILAVITZ: If I could just have a moment.

Your Honor, I believe my three months came from the actual discovery where he was mainly in the business—

THE COURT: Well, I'm operating on the facts that I deem not to be in dispute. My report says March to September.

MR. MILAVITZ: I believe in March—I believe that under the discovery, the things that I've read, I think that was only through the summer of 2000 is when he really became active in the business of dealing drugs I believe up until that time, he was—he was—

THE COURT: Here's what paragraph 5 says, counsel. There's Attachment A, Stipulation of Facts, which states that, "Beginning on or about February of 2000 and continuing to on or about September of 2000, Brian Michael Gall voluntarily entered into an agreement or understanding with others to distribute MDMA. "

That's a fact. Are you telling me it's not true?

MR. MILAVITZ: No, I'm not, Your Honor.

[17] THE COURT: Okay, So I'm going to accept that he was involved distributing this drug from February to September.

MR. MILAVITZ: And I will accept what's written there, Your Honor.

THE COURT: Okay.

MR. MILAVITZ: And I stand corrected, then. I guess what I was thinking of is when he was—when the volume picked up, and that's when—

THE COURT: Well, the only thing I know is what you and Mr. Gall and the Government agreed to. You agreed that he was involved distributing from February to September, so I wasn't prepared to come here and hear that it was three months when it's not.

MR. MILAVITZ: And I don't mean to take issue with the Court. We'll stand by that stipulation, Your Honor.

THE COURT: Okay.

MR. MILAVITZ: I think the—I think that even if you look at it from that time period, it is a small window in Mr. Gall's life, and it was at a point when he was in college.

And I think that when the Court— What's happening here is that Mr. Gall, by taking this plea bargain and taking this plea, is saying, "I'm guilty of a felony. I'm stepping up to the plate here." And I believe that that fact, in and of itself, at such a young age of only being 26 years old, the consequence of even having a felony conviction on one's record [18] at that time, and it's going to follow him throughout the remainder of his life, is a very severe consequence, and it's a weighty consequence that's going to follow Mr. Gall, and I believe that that shows great responsibility and acknowledgment of the punishment that's occurring just by that fact alone.

I honestly can come to the Court today and I can tell the Court from what I've seen of Mr. Gall from his behavior before this window of time and his behavior—and especially, more telling, probably, his behavior since this window of

time, I believe that there is very little danger of a future harm, either to the community or to anyone else.

Mr. Gall's behavior has been law-abiding. He's left that life behind. He left that life behind over four years ago, almost five years ago now, and he's basically done what we all need to do, which is to follow the law, and he's done that.

I don't believe he's any future threat because of words that I have just stated, nor do I believe there's any need of rehabilitation for Mr. Gall. Mr. Gall has self-rehabilitated himself, and from my experience, I think that's the exception, not the rule.

My practice is mainly criminal defense, and I have two—my two biggest problems with my clients are, number one, acceptance of responsibility and reality, which I think is always a large hurdle to overcome in a lot of instances, and also the fact that, quite frankly, these people's lives are a [19] mess, and they need some help. And they're gonna get it through the system one way or another, but they need some help.

And I think in Mr. Gall's case, neither of those two factors are present. I think that he has rehabilitated himself through the help, obviously, of his own character, as well as through his friends and his family, and I think that he has acknowledged the consequences of what he did.

Can you imagine, Your Honor, some—a federal agent coming to your home three years down the road after you've left college and you thought you've left that life behind and asking you if you were involved in this activity during this time period? And Mr. Gall nodded his head in acknowledgment that he was.

Regarding the issue of disparity in sentencing, I know that the Court has sentenced every other person that's been involved in this case to a prison sentence, and so the Court

may be thinking, "Well, why is Mr. Gall different? Why should I not give him the same type of sentence that I gave the other people? Why should Mr. Gall skate with probation?"

I think the answer is this: I think Mr. Gall can be differentiated from the other people that are involved in this case quite simply by the factors that I enunciated to the Court; his withdrawal from the conspiracy, his lifestyle that he's lived since that time.

I think those two factors are key to the Court being [20] able to say, "I can see why that this individual should be treated differently than the other individuals that have come forth in this court and been sentenced."

Most of those individuals were still in the practice—in the business and still involved in illicit activities when they were caught by the Government. Mr. Gall was not. Mr. Gall had long ago left that life behind and was not doing what they were doing.

It's not very often, Your Honor, that in my experience, and I'm just giving you my experience, when I deal with conspiracy cases that I've had somebody who's been charged three years after the fact after withdrawing from a conspiracy.

There is no restitution in this case, obviously. I think there are a number of other factors that factor in to Mr. Gall being—having an appropriate sentence of probation. There are others who are depending on Mr. Gall. There's his family, who are depending on him, obviously, but, as I stated in my memo to the Court and in my motion for downward departure, he has two employees. They're contract employees; however, they do depend—they work pretty much exclusively for Mr. Gall. They don't work for anybody else.

Mr. Gall's business has grown to the point where the manager of Pella windows for the state of Iowa recently contacted him, I believe either yesterday or today, and wanted to use him exclusively as an installer. That's—- And if that [21] would occur and he would have contracts that would extend indefinitely into the future, more employees would be taken on.

As it is right now, Mr. Gall has two people that work for him on an exclusive contract basis, and he has contracts that he's right in the middle of that he's waiting for windows to arrive that he believes will take him another month to finish those jobs.

He's got contracts that are out on bids to get him enough work through—and his company enough work and his employees enough work through the end of the summer, and that could even go on, if the Court places him on probation, because of this issue now with Pella windows. That's the kind of person they think of Mr. Gall.

And I know that the Court's seen the letters from his employers or the people he contracts with as well as from his employees. So I think that there is a dependence - -

THE COURT: Counsel, let me interrupt. I'm looking at paragraph 89. It tells me that in '03 he earned $27,000. What did he earn last year?

MR. MILAVITZ: Your Honor, I'm not sure. If I can have a moment.

THE COURT: Please.

MR. MILAVITZ: Your Honor, Mr. Gall believes, based upon his recollection of his taxes, he earned approximately in the mid-twenties, 24, 25 thousand.

[22] THE COURT: Okay. And having been self-employed, I know it fluctuates. What's he earn now, if he's doing so well? What are his earnings monthly or weekly?

MR. MILAVITZ: If I can ask, Your Honor.

THE COURT: Yeah.

MR. MILAVITZ: He believes his gross income, Your Honor, is somewhere in the neighborhood of 5 to 6 thousand, and he believes his net income after paying his employees and for expenses, 2 to 3 thousand dollars.

THE COURT: A month?

MR. MILAVITZ: A month.

THE COURT: Okay. Thanks very much.

MR. MILAVITZ: Sure. Just touching on some other factors that I believe Mr. Gall would be an appropriate candidate for probation is his lack of need for rehabilitation, as I've stated to the Court, his compliance with authorities.

When the agents came to discuss this matter with him, he complied. When I was first brought into this case, Mr. Gall, as you know, was living in Colorado, and that's how I got involved, and when I spoke to the—Mr. Griess and to the, you know, U.S. Marshals and arranging his surrender, he voluntarily came back to Iowa. There was not a problem with him at all.

And he's had an excellent record of pretrial release. [23] Since he's been back, he's done everything that's been asked of him. There's been all clean drug tests, and there has been no problems at all that I'm aware of. And I don't know if Court is, but I'm sure that if there would have been it would have been brought to the Court's attention, as well as my attention.

So one can conclude from that that he has done everything, and I know that the Court is aware that he's made all of his court dates and there's never been an issue with that.

THE COURT: All right.

MR. MILAVITZ: I know that the Court can depart on its own motion, and I know that since Booker there's an issue of if the Court even needs to downward depart to do that, but I think that that's an issue that I wanted to touch on very briefly that Mr. Gall did cooperate with the Government, that when he was asked to come in and debrief, he did so.

And we knew going into that whole situation that it was totally up to the Government's discretion if they were going to file a 5K1.1 motion or not. And even knowing that,—And I also let Mr. Gall know that it's been my experience that people who go in and speak to the Government and then go to prison oftentimes are placed in a very difficult situation by fellow prisoners.

[24] Knowing all those issues, Mr. Gall still decided to voluntarily go in and speak to the Government, and I flew in specifically from Colorado, and we spent, I believe, an hour or two with the agent, and I believe that Mr. Griess was present during part of that—during that interview.

I believe that federal law—And I want to cite the case of U.S. v. King, 53 Fed. 3d 559. There's some language in there that states that the Court must evaluate an individual's cooperation on an individual basis and cannot engage in a mechanical reduction.

So I believe that there is sufficient case law out there that does allow the Court, on its own motion or if it believes it's the right thing, to determine, even if the Government doesn't file a 5K1.1, to downward depart based upon that.

THE COURT: That's not the law in our circuit.

MR. MILAVITZ: I understand, Your Honor, but I believe other circuits have recognized that.

THE COURT: In fact, I think most of the post relevant conduct, the Government would claim is already given credit to the defendant by acceptance of responsibility. I don't mean

to make their argument for them, but at least that's been my experience.

MR. MILAVITZ: I understand.

THE COURT: You're claiming that this is an [25] extraordinary acceptance of responsibility?

MR. MILAVITZ: I think that under the King case, Your Honor, that's where the Court said that the Court should not just indulge in a mechanical three-point reduction for acceptance of responsibility and go beyond.

THE COURT: And what circuit is that from?

MR. MILAVITZ: That is from the Third Circuit, Your Honor, in 1995.

THE COURT: Okay.

MR. MILAVITZ: I think that one of the other things—when I was preparing for this hearing, the thing that I had to keep coming back to is that Mr. Gall falls under the guidelines from 2000, not from today's date, and back in 2000, especially pre-November of 2000--

THE COURT: Actually, Ms. Dassinger I believe her report shows that she used the '99 guideline.

MR. MILAVITZ: I guess that the point that I'm trying to make is that up to November of 2000, the Sentencing Commission allowed for a larger number of departures, a larger area for departures, and some of the larger areas of departures that I want to address very briefly with the Court are super-acceptance of responsibility, which I believe applies in this case; extreme remorse, which I think definitely applies in this case; post-offense rehabilitation, which certainly applies in this case; and a voluntarily—and probably one of the most [26] significant ones is a voluntary cessation of criminal conduct before the discovery of the crime..

And this is a Tenth Circuit case, so I'm kind of hometowning you from my circuit, Your Honor, but there is a case called *U.S. v. Nunemacher*, N-u-n-e-m-a-c-h-e-r, and that cite is 362 Fed. 3d 682, and that's actually a Tenth Circuit case from 2004. And there, the Court did find grounds for downward departure for voluntary withdrawal or cessation of criminal activity before, and I think that's significant in Mr. Gall's case.

And I think, finally, one final area where the Court can downward depart is the fact that Mr. Gall has engaged in exceptional charitable and community activities and good works, and for that proposition, I cite to the *Court U.S. v. Cooper*, 394 Fed. 3d 172, another Third Circuit case.

Obviously, the Court can .tell I like the Third Circuit, because I think that they're very generous with their downward departures.

But I think that in this instance, Mr. Gall has done a lot since he's been out, as noted in the letters to the Court. He has donated his time and his expertise to charitable causes, specifically working on low-income and moderate-income housing projects.

And given the fact that Mr. Gall is extremely busy running his own business, where he's basically working at least [27] six days a week, I find it extraordinary that he can take his only day off of the week and do this type of work. I think that's commendable for Mr. Gall.

So under the totality of the circumstances, Your Honor, I believe there are significant areas for downward departure from the guidelines. And I understand that the guidelines are only advisory at this point; however, I do believe that most courts, and I'm sure this Court does too, still relies and uses them as a benchmark, probably, to start with. I don't mean to be presumptuous. I mean just that's been my experience so far in federal courts since Booker.

But I do believe that even if the Court—I do believe that the Court can look at the individual, can look at Mr. Gall as the individual, and if it looks at Mr. Gall, the totality of what Mr. Gall is, what he's done and where he's at now weigh heavily in favor of not incarcerating Mr. Gall but, rather, placing him on probation, allowing him to continue to be a positive and vibrant member of our society.

And I know that Mr. Gall— I guess we'll wait for Mr. Griess. Thanks very much.

THE COURT: Right. Thank you.

Mr. Griess?

MR. GRIESS: Thank you, Your Honor.

I think it's always difficult after the Booker decision to consider the interplay between the downward departure motion and the Court's discretion that it now possesses with regard to 3553(e), but I will go ahead and discuss the downward [28] departure issue just briefly, and I think the best way to do this is just with regard to the general subject matters defense counsel cites for reasons for a departure.

First of all, with regard to age, of course, under the policy statement that the defendant did cite, age is not ordinarily relevant. I would point out to the Court that the defendant's age is very similar to other people in this case. I don't think that there's anything about his age that is so extraordinary that in and of itself would require a departure from the Court.

With regard to his voluntary withdrawal from the conspiracy in this case—And the Government did stipulate to this, because the evidence that it possessed is that that is what occurred, but I do think the Court needs to understand that the defendant is already receiving a significant benefit from the fact that he did voluntarily withdraw.

Because he voluntarily withdrew before the guidelines changed for MDMA or Ecstasy, he was sentenced at a much

lower conversion weight. In 1999, the guidelines that are in effect for today are 1 gram of MDMA equals 35 grams of marijuana. The conversion ratio that everyone else in this case will face is that 1 gram of Ecstasy equals 500 grams of marijuana, or 14 [29] times that conversion quantity that the defendant faces.

So the fact that he did voluntarily withdraw, he's already receiving a significant benefit for that, and I'll talk more about that in a little bit.

With regard to the three-month—or what the defendant characterized as a three-month period of an involvement and what I think the Court also realizes was a little bit longer than that, essentially from late winter or early spring of 2000 into the end of summer, or just before Mr. Gall returned to school at Iowa State, he was involved in the distribution of Ecstasy, smaller quantities at first, and then it picked up to much larger quantities as the summer went along.

The reason I believe this is already being taken into account, Your Honor, is the fact that he's only being accountable for those pills that he dealt with at that time. As the court, knows, the law of conspiracy is that he could be held accountable for what was foreseeable, but because he withdrew from the conspiracy, in accordance with the law, he's only held accountable for that.

So indirectly, he's already receiving a benefit from the relatively small period of time he was involved in this case from the other defendants who were involved.

With regard to cooperation with the Government, the Court, I think, has already noted what the correct standard in the Eighth Circuit is with regard to when the Court can depart, [30] but to the extent the Court would consider this as something under 3553(a) that needs to be taken into consideration in arriving at the defendant's sentence, I would

just say that, number one, as the Court noted, he has already received acceptance of responsibility.

Number two, what the law requires of the defendant is to provide substantial assistance, and while he did debrief and cooperate, he did not substantially assist the Government in the prosecution of others, through no fault of his own, but the simple fact of the matter is that when he provided the information, the individuals he knew about and could talk about had already either confessed and were cooperating themselves or were not individuals who the Government was pursuing at that time.

I am not aware of any substantial risk to the defendant's personal safety as a result of his cooperation because, like I say, everyone he talked about has also already cooperated.

The last thing and, I think, the most important thing that I think needs to be taken into consideration by the Court, and I'm going to talk about this in a minute—I'm going a little out of order here—is the fact of the matter is it's not that he came in and cooperated and gets no benefit. He does receive a benefit. He gets safety valve. Because he is required under those provisions to truthfully debrief and [31] provide information, and because he did that, he receives an additional two levels off of his sentence.

And so I think he is receiving credit for his—already for his cooperation to the extent he did cooperate and provide truthful information. And just so it's clear for the record, the Government did not use any of Mr. Gall's information in the prosecution of another individual in this case or any other.

With regard to aberrant behavior, quickly, and, once again, this is no longer incumbent or required by the Court, but the guidelines do indicate that in order to qualify for aberrant behavior, the crime had to be committed without significant planning and be of limited duration, specifically only if the

defendant committed a single criminal episode, occurrence, or single criminal transaction.

That obviously is not the case here. There was significant planning, up to and including a meeting whereby a group of individuals discussed how they were going to proceed at a certain point in the conspiracy just prior to the two 5,000 shipments—5,000-pill shipments of Ecstasy that occurred.

It was not a one-time occurrence, it was multiple transactions, and for those reasons, under the law or under the guidelines section 5K2.20, the defendant does not qualify for aberrant behavior or a reduction for aberrant behavior.

Turning to the factors in the 3553, Your Honor, I [32] think it's important for the Court to contemplate on the seriousness of the offense, obviously, to promote respect for the law and provide just punishment for the offense.

Essentially, what occurred in this case is in February of 2000, Defendant hooked up with Luke Rinderknecht, who at that time was living in Central College—or in Pella, Iowa, going to Central College in Pella, Iowa. There were small, I believe one- to two-hundred-pill, purchases being made at that time by Mr. Gall from Mr. Rinderknecht.

After a period of time—or after he graduated, actually, Mr. Rinderknecht was going to move to California. He met with other individuals in the conspiracy, Mr. Gall and Mr. Sauerberg, and then a plan was developed about how they were going to continue to sell drugs when Rinderknecht left. Specifically, Rinderknecht would mail them to Sauerberg, Sauerberg would provide the pills to Gall, who would. then distribute to other individuals. Gall would provide the money back to Sauerberg, and the money would then go back from Sauerberg to Rinderknecht. That's how this conspiracy worked with regard to this group of people.

The people Mr. Gall stipulated to selling Ecstasy to, I think this is significant, because the Court needs to be cognizant of the fact of what the other individuals received for sentencing. Mr. Harbison, who was the customer of Mr. Gall's, received a 30-month sentence; Mr. Gooding, who was [33] a customer of Mr. Gall's, received a 35-month sentence; and Mr. Coleman is actually still pending sentence.

However, in approximately September of 2000, Gall did decide to cease his activities and the involvement in this case and, in fact, communicated that fact both to Mr. Rinderknecht and to at least one of his customers, I believe it was Mr. Coleman.

There were two large-quantity shipments of pills that Mr. Gall's being held accountable for in this case, Your Honor Those were the two 5,000-pill shipments. I take issue a little with the fact—with the idea that these are small to medium quantities. The fact is that's 10,000 pills, which, no matter how you look at it, is not a small quantity.

I think this is especially true when you consider that Mr. Gall profited 30 to 40 thousand dollars as a result of, his involvement in this case. I think that also needs to be considered by the Court when considering whether this is just a one-time product of some misguided youth or a real serious criminal offense, which it clearly is.

THE COURT: Mr. Griess, come back to where you are, and I apologize for interrupting, but I was writing as you were telling me, and looking at my report as well. You told me two other defendants, and I have my report here, and on page 1, you told me Harbison, and I couldn't write quick enough. You said 30 months, and then you named another defendant, whom I didn't [34] hear, and you said 35 months.

MR. GRIESS: That's correct. His name is Mr. Gooding.

THE COURT: Gooding, okay. Now, these are not listed on the report as other co-defendants. That's the reason I didn't have it. They're not listed as co-defendants or related cases, but they are?

MR. GRIESS: They are, Your Honor. And you can see, if you would look at the plea agreement in the case, that these are the individuals who the defendant was supplying with MDMA.

What happened in this case, Your Honor, and the reason probably why those aren't included, is the investigation occurred over time whereby one individual was arrested, he pointed to another individual, who pointed to another individual, and they went right up the chain to the top.

Now, when those last people in the conspiracy, were charged, including the suppliers for Ecstasy and cocaine, the remainder of the people who hadn't been approached early on 'were also charged.

So Mr. Gooding and Mr. Harbison, along with some other individuals, a person by the name of Dryer, I believe one other possibly, were convicted along the way. And I did confirm this morning through electronic filing system that those were the sentences that they did receive.

THE COURT: That must have been somebody other than [35] me. I don't remember those defendants.

MR. GRIESS: That's very—could be the case, Your Honor.

THE COURT: All right.

MR. GRIESS: In fact, I believe it was Judge Longstaff.

THE COURT: Okay.

MR. GRIESS: The last point I was making, Your Honor—

THE COURT: Before I get off that, how long did they stay, if you remember—You probably know more about this case than anybody. How long did those two stay in the conspiracy, and did they voluntarily withdraw?

MR. GRIESS: They did not.

THE COURT: They did not?

MR. GRIESS: They did not voluntarily withdraw. And they were in the conspiracy, I think, for a shorter period of time, but at the very end.

THE COURT: Okay. Thank you.

MR. GRIESS: A significant difference there, Your Honor, is that they were in the conspiracy after the guidelines changed and, therefore, were sentenced at a much higher level because of that.

THE COURT: Okay. I interrupted you. I apologize.

MR. GRIESS: That's all right. Thank you, Your [36] Honor.

The last point I was making, I'm sure the Court heard me, was with regard to the profit. I think the fact that he made 30 to 40 thousand dollars of ill-gotten gain in this case is a significant factor when the Court looks at seriousness of this particular offense.

THE COURT: Where is that in the evidence? I mean, I'm not disputing you. I saw a figure referred to of $85,000 that Rinderknecht got delivered to him. I didn't see any other figure. Was there another figure in the report?

MR. GRIESS: Indeed, Your Honor. If I could just have one moment.

THE COURT: Okay.

MR. GRIESS: It's paragraph 32.

THE COURT: Okay.

MR. GRIESS: Which indicates that Harbison estimates that Gall made approximately 40,000 from selling Ecstasy. I say 30 to 40 because Mr. Gall, in paragraph 30, indicated $30,000—

THE COURT: Okay.

MR. GRIESS:—was the appropriate amount.

THE COURT: So Harbison estimated Gall made approximately $40,000 is what 32 says.

MR. GRIESS: Correct. And, like I said, Mr. Gall said 30,000, and that's why I mentioned to the Court 30 to 40 [37] thousand.

THE COURT: Right.

MR. GRIESS: The $85,000 figure would have represented cost, not profit, and, obviously, what Mr. Rinderknecht would have then taken his profit out of and passed along the price to his supplier, which was Mr. Morataya.

I think there is a question of deterrence in this case. I think that other individuals need to know that you cannot sell significant quantities and make significant profits from MDMA or Ecstasy, even for a short period of time, and escape accountability for those crimes.

The last thing I think I want to talk about goes to sentencing disparity, Your Honor. Obviously, the Court is cognizant of that and wants to avoid any unwarranted sentencing disparities.

Last Friday, before Judge Gritzner, another co-defendant in this case was sentenced. His name is Jarod Yoder, and I believe that those present very similar circumstances to the Court in terms of the relative involvement.

Mr. Yoder, pursuant to the plea agreement and as corroborated by the presentence report—these are all matters, Your Honor, that were discussed in open court—was responsible for 5,000 pills or 1,250 grams of a mixture and substance containing MDMA, which, because he was involved after the[38] guideline range equivalents—or is the equivalent of a Level 28 quantity of drugs. Yoder was ultimately sentenced to a 36-month term of imprisonment.

Mr. Gall was represented as responsible in this case for a larger quantity, in fact, double the quantity of pills, 10,000 pills, but because his involvement stopped—and I think he does get credit, he is getting credit for the fact that he voluntarily withdrew, and the biggest credit is the fact that he doesn't have to deal with the higher guideline figure—he's responsible only at a Level 24, four levels lower, even though he's about double the amount of pills.

Both Yoder and Gall were receiving Ecstasy from Rinderknecht—Yoder was in Minnesota at the time; Mr. Gall was in Iowa, of course—and they were redistributing it for profit. In terms of differences between their cases, as I said, Yoder was a smaller quantity of pills but a longer period of time. It wasn't quite as short a period of time. I think his last involvement was March of 2002. I think the start times were similar, but, again, it was more sporadic and drawn out, and he, obviously, paid the consequences for that.

Again, other differences are the fact that Gall did withdraw. There is a criminal history difference. Mr. Yoder did not receive the safety valve. He had two convictions for possession of marijuana, and that is all. Unlike Mr. Gall, though, he did not receive a deferred judgment on one of those, [39] and so those counted. He was Criminal History Category II and did not receive the benefit of the safety valve.

THE COURT: How did he get to 36? Did he substantially assist?

MR. GRIESS: No. No, Your Honor.

THE COURT: Okay. How did he get to 36? If there was a mandatory minimum, I'm assuming, because you're talking about safety valve, then he must have done something. How did he get below the mandatory minimum?

MR. GRIESS: There is no mandatory minimum, just like there isn't in this case.

THE COURT: Oh, okay.

MR. GRIESS: In that case, the safety valve doesn't operate to get you below a mandatory minimum, but you do receive the benefit, like Mr. Gall's getting here today, of a two-level reduction.

THE COURT: Okay.

MR. GRIESS: So essentially, he was at a Level 28, received two—three levels off for acceptance of responsibility, and then a Criminal History Category II. That was the sentence he received, 36 months' imprisonment.

That is not 36 months—The Court then, Judge Gritzner, evaluated, as this Court will do under the statute, and determined that 36-month sentence was appropriate under the circumstances

[40] THE COURT: Okay. All right.

MR. GRIESS: But just in terms of pure comparison, that I think their relative contact, their age—in fact, Mr. Yoder was a little bit younger than Mr. Gall—at the time of his sentencing Yoder was gainfully employed—he was an underwriter at a credit organization, his employer is holding his job open—no pretrial release violations, no involvement whatsoever in criminal conduct or specifically this conspiracy since March of 2002. So I think those situations are very, very similar, and he received a 36-month sentence.

For all of those factors, Your Honor, I think that a sentence at the low end of the guideline range in this case or to 30 months is appropriate to address all the factors pursuant to Title 18, United States Code, Section 3553(e)—or 3553, as well as the other factors the Court will take into consideration in sentencing the defendant.

Unless the Court has any questions, that's it.

THE COURT: I do. Mr. Griess, as a legal matter, I saw an opinion the other day, and I didn't probably read the opinion as well as I should have, but the Judge—I think it was one of the districts in Florida, the Judge said he was—this is probably unfair characterization—he was critical of the Government for always standing on the guideline, guideline, guideline on the theory that that's not the law anymore.

It is the law that we have to consult and seriously [41] consider the guidelines, but the recommended sentence doesn't always have to be the guideline. Are you suggesting here that the appropriate sentence is the guideline here?

MR. GRIESS: Yes.

THE COURT: Okay.

MR. GRIESS: I absolutely acknowledge, as I have before this Court in the past, that the Court is not bound by the guidelines.

THE COURT: No, no, no. I know that. But have you ever recommended anything other than—And it may be the policy, and I guess that's what I need to know. Have you ever recommended anything to a sentencing Judge in the Southern District of Iowa except a guideline sentence?

MR. GRIESS: I haven't, Your Honor.

THE COURT: All right.

MR. GRIESS: But I want to be clear to the Court, if I could, that that's not—that's not out of some blind following

of a policy. It's because I personally believe that the guidelines are appropriate and should be followed.

THE COURT: Well, you always know the factual record very well, Mr. Griess, so I'm sure that that's an honestly arrived at answer.

MR. GRIESS: Thank you.

THE COURT: Mr. Gall, before you make your statement of allocution, I wanted to tell you that I received and have [42] read letters from Tina Plett Kalanoff (phonetic)—I'm probably mispronouncing it—and from Christopher Shawn King and from Eric Kellina, and as well I also got letters, and I read them, before today from your aunt, Cheryl Meyer; Mr. Waddell, who signs it as the Pella sales manager.

And then I got a letter from Michael McKenna and Jennifer McKenna, and I got a letter from Fred Novy—Kelli, that's N-o-v-y—and a letter from Kerri Hanna, who I believe from the report is your sister. And then I got a letter from Mark Anderson, who describes himself as the retail replacement sales manager for Pella windows and doors.

I got a letter from Michael Glick in Solon, Iowa; and a letter—a letter signed by Glen and Bernie Leach from Davenport; and a letter from Deb Lamp and another letter from Debra Stillwell and a nice letter from your mother and a letter from Michael Meyer and another letter from your father a letter from your father; a letter from Amy Plett, P-l-e-t-t, who I believe is your girlfriend, if I read the report right; and then I also got a letter from Laura Meyer.

So, Mr. Gall, you have a right of allocution, which every defendant does before sentence is pronounced. It's supposed to be as much for the sentencing Judge as it is you, so if you have anything to say or you want to say, you may do so.

THE DEFENDANT: Do you want me to stand up?

[43] THE COURT: Yes. I can probably hear you better. As long as the reporter and I can hear you, and if I can't hear you, I'll tell you.

THE DEFENDANT: All right.

MR. MILAVITZ: Your Honor, before Mr. Gall exercises his right to allocution, I'd like to— Am I allowed to comment on anything that Mr. Griess said?

THE COURT: Okay.

MR. MILAVITZ: Thank you very much.

I just have a very brief comment. I believe that according to the discovery that I read, and I may be wrong about this, and I just asked Mr. Gall, but he did confirm it, and I don't know if Mr. Griess is aware of this or not, but the two people that Mr. Griess compared Mr. Gall to, Mr. Gooding and Mr. Harbison, who he said were in the conspiracy for, I believe, shorter amounts of time, it's my understanding from—talking to Mr. Gall that they were involved in the conspiracy while Mr. Gall was and then continued to remain in the conspiracy after Mr. Gall withdrew.

So that—And that is my recollection too. I believe they were much smaller quantities as far as sellers. I believe that Mr. Gall was selling to them and then they were reselling, but I believe that is my recollection. And I may be incorrect, but that's what I believe is the case.

THE COURT: Mr. Gall?

[44] THE DEFENDANT:I first want to let you know that I was young and stupid when I committed this crime, and at that time my knowledge of the crime—I was lacking knowledge of how serious the crime was, and I'm willing to take full responsibility of the choices that I made.

I also wanted to let you know that I disengaged from these activities voluntarily. I continued on with my life. I went on

to get a degree from the University of Iowa, moved away from the bad people I was hanging out with, and, of course, as you know, I've started my own business.

As my punishment goes, I am-- I am ready to receive whatever kind of punishment you will give me today, but I want you to keep in mind that there's a lot of people depending on me, including my family, friends, business associates, my employees, my community. My unfinished work, my—the jobs I already have that stretch into August, if I receive a prison sentence today, I will be damaging the relationships that I have with these people.

So I'm asking you for a probation sentence and a chance to prove to you and all these people that I have changed my life and that I am going to continue to strive down the new road that I have created.

THE COURT: Thanks very much.

The record should show—You can be seated, because I'm going to be talking for a while.

[45] Mr. Gall, the lawyers and I necessarily, for the purposes of doing what the Congress and the Courts tell us to do, we have to speak in this language that permits my judgment to be reviewed, as both you and the Government are entitled to have it reviewed under the law, so I speak in terms of guidelines and cases, that sort of thing. It does not detract from the fact that the Judge who sentences a person should know the consequences of sentencing another person.

So oftentimes, in retrospect, it appears that the sentencing Judge is referring to this or that guideline, this or that range, or that sort of thing. It's important that you know that we don't speak this way on purpose, we have to comply with what the law demands of us.

It's the Judge's duty in this case to calculate the guidelines, and I consider it necessary to address the requests that your

lawyer has made to depart from the guideline that Ms. Dassinger, you, and the Government have agreed is the appropriate guideline, given what happened in this case, and so for the purposes of doing that, I adopt what Ms. Dassinger tells me happened in this case in terms of the conduct. I have incorporated into that the stipulation, that is, the agreement between the parties as to what happened in this case.

And, therefore, the total offense level is 19, the criminal history category is I. The Court, under the advisory guidelines, has to consult and seriously consider the total [46] offense level, as well as the criminal history category. The imprisonment range that that yields is 30 to 37 months, a supervised release range of two to three years, and a fine range of 6,000 to a million dollars.

With respect to the aberrant behavior request, the Court is unable to grant such a request under the advisory guidelines. The aberrant behavior contemplated, in my view, by the guidelines is, as the Government pointed out, an act that is of limited duration. It seems to me the activity described in the report, as well as the stipulation, make the aberrant behavior not grounds for departure.

Likewise, what counsel described as a super-acceptance of responsibility is denied. The defendant's already given credit by the guideline for acceptance, and it's reflected in the report.

Likewise, the Court denies a request for a departure based upon remorse or post-offense rehabilitation or for voluntary cessation of criminal activity before it was discovered by the Government. I think the better way to address these matters is within the confines of the statute, which I'm going to do.

Mr. Gall, the statute is 3553(a), and so while I've considered the guidelines, the Court is going to give a sentence other than that contemplated by the guidelines in

this case, and I'm going to be reading this into the record for [47] purposes of the parties, as well as the Court of Appeals.

As required by 18 United States Code 3553(a), in imposing the following sentence, the Court has considered the nature and circumstances of the present offense, along with the characteristics of this defendant. In addition, the Court has reflected upon the seriousness of the offense, the need for adequate deterrence, the protection of the public from further crimes by this defendant, the need for the defendant's rehabilitation, the types of sentences available, the suggested sentencing range outlined in the United States Sentencing Guidelines, along with pertinent policy statements.

The Court also continues to heed the admonition of United States Code 3582(a) that expressly recognizes that, quote, imprisonment is not an appropriate means of promoting correction and rehabilitation, end of quote.

On March 2nd, 2005, the defendant pleaded guilty to one count of conspiracy to distribute MDMA under 21 U.S.C. 846 841(b)(1)(C), a Class C felony. See the plea agreement at page 1.

The Court in particular has taken into account the defendant's voluntary and explicit withdrawal from the conspiracy in September of 2000; the defendant's exemplary behavior while on bond; the support manifested by family and friends who have attested to the defendant's character; the lack of criminal history, especially a complete lack of any [48] violent criminal history; the immaturity of the defendant.

This factor is not an inconsequential consideration. Recent studies on the development of the human brain conclude that human brain development may not become complete until the age of 25. See Elizabeth Williamson, "Brain Immaturity Could Explain Teen Crash Rate," Washington Post, page A01, February 1st, 2005, summarizing a recent National Institutes of Health study that suggests, and quote, that the

critical region of the brain that inhibits risky behavior is not fully formed until age 25, end of quote.

This is of critical importance in the area of criminal law. The Sentencing Commission, in its studies, has deduced that recidivism rates drop as the age of a defendant increases. See United States versus Nellum, 2005 Westlaw, 300073, February 3rd, 2005, Northern District of Indiana.

The Supreme Court of the United States based its most recent death penalty decision, Roper versus Simmons, on studies indicating adolescents are less culpable than adults for their actions. See 125 Supreme Court 1183 at 1195, 2005, stating that, quote, as any parent knows, and as the scientific and sociological studies respondent and his amici cite tend to confirm, quote, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and [49] decisions, end of quote.

It has also been noted that, quote, adolescents are overrepresented statistically in virtually every category of reckless behavior, citing Arnett, "Reckless Behavior in Adolescence: A Developmental Perspective," 12 Developmental Review 339, 1992.

While the Roper versus Simmons Court held the imposition of the death penalty is unconstitutional for those people who committed the death-eligible crime before the age of 18, the recent National Institutes of Health report confirms that there is no bold line demarcating at what age full maturity is reached.

While age does not excuse behavior, a sentencing court should account for age in discovering the overall characteristics of the defendant, particularly at the time he engaged in the conspiracy in this instance from March of 2000 through September of 2000.

Since the time of the offense conduct, the defendant has graduated from the University of Iowa with a degree in computer science. The defendant owns and operates BMG Construction Service, a company principally devoted to subcontracting for the installation of Pella windows and doors.

Representatives of the Pella Corporation have also written to the Court describing the defendant as, quote, reliable, honest, friendly, and polite, end of quote, with a, [49] quote, superior work ethic and a valuable resource, end of quote.

Soon the defendant's company will begin a significant construction project, the replacement of windows and doors at Northwestern University in Evanston, Illinois.

The Court can only conclude from the defendant's post-offense conduct that he has, in fact, learned from his experience with the United States criminal justice system and has admirably moved to secure a better future for himself.

The Court, however, is bound to impose a sentence that reflects the seriousness of joining a conspiracy to distribute MDMA or Ecstasy. This can best be accomplished in this case by a term of probation for three years with appropriate conditions. Under 18 United States Code 3561(a), it allows the Court to grant probation for offenses other than a Class A or Class B felony.

The Court reminds the defendant that, quote, probation, however, is not an act of leniency. Probation is a substantial restriction of freedom. It is not forgiveness, and it is not endorsement of the offense. See State versus Peckenschneider, 236 Northwestern Second 344 at 353.

The Sentencing Guidelines in the introductory comment to Part B, quote, Probation, state that, quote, probation may be used as an alternative to incarceration provided that the terms and conditions of probation can be fashioned so as to [51]

meet fully the statutory purposes of sentencing, including promoting respect for the law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant, end of quote.

The Court recognizes that according to the Sentencing Guidelines, probation is not recommended when, as in this case, the guideline range falls outside of Zone A. This is because the offense level in this case, based solely upon the drug quantity, as the lawyers have pointed out, subjects the defendant to a final offense level of 19.

Other courts have recognized, however, that for a variety of reasons, the guideline calculations based on drug amount may overrepresent the offense conduct. See United States versus Smith, 359 Fed. Supp. 2d 771 at 776, Eastern District of Wisconsin, 2005, noting that the defendant's offense conduct would have been reduced by six levels if he was responsible for powder instead of crack cocaine.

See also United States versus Nellum, cited earlier in my colloquy, describing the system of drug quantities as random as it plays out in reality.

See also United States versus Huerta-Rodriguez, 35 Fed. Supp. 2d 1019 at 1026, Footnote 6. Judge Batillon states, quote, the quantity system was developed to punish—was developed to punish bigger distributors more harshly, but the practice of charging conspiracies over a long period of time [52] has the result of aggregating many small distributions so as make a long-term small-quantity distributor look like a large-quantity distributor.

While not denigrating the seriousness of the offense conduct in this case, the Court finds the offense level based solely upon drug quantity does not adequately reflect the offense conduct.

Nevertheless, under the statutory mandates of 3553(a), the Court finds that the circumstances of the offense and the character of the defendant as described by the Court in this colloquy warrants a sentence of probation.

18 United States Code 3563(b) authorizes the Court to provide, along with the mandatory provisions of probation, discretionary conditions in keeping with factors set forth in 3553 (a) (1) and (a) (2) .

Accordingly, the Court also provides these conditions of probation: You shall participate in a program of testing and treatment for substance abuse as directed by the probation office until such time as you are released from the program by the probation office;

Two, you shall not use alcohol and/or other intoxicants during and after the course of treatment;

Three, you shall submit to a mental health evaluation and participate in treatment if recommended, which may include compliance with any medical regime recommended by treatment [53] personnel as directed by the probation office;

Four, you shall not patronize business establishments where more than 50 percent of the revenue is derived from the sale of alcoholic beverages;

Five, you shall work only in employment approved by the U.S. Probation Office. You shall consult the U.S. Probation Officer prior to any changes in employment. You shall not terminate any employment without prior approval of the probation office.

Mr. Gall, your conduct from about age 16 through the time you withdrew from this conspiracy indicates a lot of addictive behavior. Your blood alcohol was .39 in the accident. I assume you were lucky to have escaped injury. You better get some medical treatment that recognizes you apparently have a disease.

Most of us have no insight into our mental health or addictive behavior, so the only thing that I wish you would have done between your withdrawal from the conspiracy and now is to get some help. I think you have an addiction problem. Looking at this record, I think any objective observer would have to agree with that.

In addition, if you've not yet done so already, Mr. Gall, you should pay $100 to the clerk's office on behalf of the crime victims fund. Based upon what Ms. Dassinger and your lawyer tell me is your financial condition, there's not [54] going to be any further fine or penalty due based upon what deem right now is your inability to pay.

Counsel, do you have anything further before I advise the defendant of his constitutional right of appeal?

MR. GRIESS: No, Your Honor.

MR. MILAVITZ: Your Honor, the only issue that I have is I assume the standard terms and conditions of probation also apply along with—

THE COURT: You should review those with your client, counsel. That will be in the judgment and commitment order.

MR. MILAVITZ: Okay. I'm not— And excuse my ignorance, but I'm not familiar with the standard terms and conditions in this District, but, however, in the District of Colorado, typically one cannot leave the state without permission by the probation officer or the Court, and what Im going to ask the Court—

THE COURT: That's number one in our standard conditions. I'll have my law clerk give them to you so you can review them with the defendant.

MR. MILAVITZ: I will ask the Court— As noted in the presentence report and also in the questions to Mr. Gall's parents or—I believe somewhere, maybe to me, Mr. Gall is

part-owner of a vacation home in Lake of the Ozarks in Missouri.

I will ask the Court—He's got a vacation planned [55] for this weekend, basically, and I would ask the Court to allow him to travel to that vacation home for this weekend, if that's possible. He's already talked to his probation officer or his pretrial release officer, and I believe their response to him was that's fine, but he needs the Court's permission.

THE COURT: Okay. You should talk to the people in supervision yet today, Mr. Gall. It's not a problem for me, but you should talk to people in supervision. Ms. Wilson is our supervisor. Ms. Dassinger can put you in touch with her immediately.

THE DEFENDANT: Okay.

THE COURT: Anything else?

MR. MILAVITZ: Thank you very much, Your Honor.

THE COURT: Mr. Gall, this is a final judgment of the District Court. You and the Government have an opportunity to appeal my judgment to the Court of Appeals if you believe the sentence is illegal or unreasonable. If you or the Government want to take that appeal, you have to file a written notice with the clerk of court within ten days of the entry of today's judgment. You have to serve a copy on the United States Attorney's Office.

The law further requires that I tell you that if you do want to take an appeal from the judgment and commitment order, you have to show me you are unable to afford a lawyer, and I have to appoint a lawyer to represent you on the appeal.

[56] Mr. Gall, do you have any questions about your judgment and commitment order here today or about your constitutional right of appeal?

THE DEFENDANT: No, Your Honor.

THE COURT: We'll be in recess.

(Proceedings concluded at 2:55 p.m.)

CERTIFICATE

I, the undersigned, a Certified Shorthand Reporter of the State of Iowa, do hereby certify that I acted as the official court reporter at the hearing in the above-entitled matter at the time and place indicated.

That I took in shorthand all of the proceedings had at the said time and place and that said shorthand notes were reduced to typewriting under my direction and supervision, and that the foregoing typewritten pages are a full and complete transcript of the shorthand notes so taken.

Dated at Des Moines, Iowa, this 3rd day of June, 2005.

/s/ Kelly M. Mulcahy

CERTIFIED SHORTHAND REPORTER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

Case Number: 04-116
USM Number: 07160-030

UNITED STATES OF AMERICA

v.

BRIAN MICHAEL GALL

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

☒ pleaded guilty to count(s) One

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court. _____

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:846, 841(b)(1)(C)	Conspiracy to Distribute MDMA	10/30/02	One

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ___

☐ Count(s)_____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 27, 2005
Date of Imposition of Judgment

/s/: Robert W. Pratt
Signature of Judge

Robert W. Pratt, U.S. District Judge
Name and Title of Judge

May 27, 2005
Date

PROBATION

The defendant is hereby sentenced to probation for a term of:
36 months

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;

2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. the defendant shall support his or her dependents and meet other family responsibilities;

5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to

confirm the defendant's compliance with such notification re-quirement.

SPECIAL CONDITIONS OF SUPERVISION

You shall participate in a program of testing and treatment for substance abuse, as directed by the Probation Officer, until such time as you are released from the program by the Probation Office. You shall not use alcohol and/or other intoxicants during and after the course of treatment.

You shall submit to a mental health evaluation and participate in treatment, if recommended, which may include compliance with any medical regime recommended by treatment personnel, as directed by the Probation Officer.

You shall not patronize business establishments where more than fifty percent of the revenue is derived from the sale of alcoholic beverages.

You shall work only at employment approved by the U.S. Probation Office. You shall consult the U.S. Probation Office prior to any changes in employment. You shall not terminate any employment without prior approval from the U.S. Probation Office.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100	$	$

☐ The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS $_____ $_____

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the
☐ fine ☐ restitution.

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses

committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $ 100.00 due immediately, balance due
☐ not later than _____, or
☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary penalty payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, Iowa 50306-9344.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal mone-

tary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

STATEMENT OF REASONS
(Not for Public Disclosure)

☒ THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS WITHOUT CHANGE

OR

☐ THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS BUT WITH THESE CHANGES: (Use Page 3, if necessary.)

☐ Chapter Two of the U.S.S.G. Manual determinations by court (including changes to base offense level or specific offense characteristics):

☐ Chapter Three of the U.S.S.G. Manual adjustment determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility);

☐ Chapter Four of the U.S.S.G. Manual determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

☐ THE COURT ADOPTS THE PRESENTENCE REPORT WITH THESE COMMENTS OR FINDINGS (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions. Specify court comments or findings, including paragraphs in the presentence report.) (Use Page 3, if necessary.)

GUIDELINE RANGE DETERMINED BY THE COURT (BEFORE DEPARTURES):

Total Offense Level: 19

Criminal History Category: I

Imprisonment Range: 30 to 37 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 6,000 to $ 1,000,000

☒ Fine waived or below the guideline range because of inability to pay.

☐ THE SENTENCE IS WITHIN THE GUIDELINE RANGE, THAT RANGE DOES NOT EXCEED 24 MONTHS, AND THE COURT FINDS NO REASON TO DEPART.

OR

☐ THE SENTENCE IS WITHIN A GUIDELINE RANGE, THAT RANGE EXCEEDS 24 MONTHS, AND THE SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS: (Use Page 3, if necessary.)

STATEMENT OF REASONS
(Not for Public Disclosure)

RESTITUTION DETERMINATIONS

Total Amount of Restitution: _____

☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).

☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).

☐ Restitution is not ordered for other reasons:

☐ Partial restitution is ordered under 18 U.S.C. § 3663(c) for these reasons:

DEPARTURE (Check all that apply)

☒ The sentence departs below the guideline range for the following reasons; or

☐ The sentence departs above the guideline range for the following reasons:

Pursuant to a Plea Agreement

- ☐ based on 5K1.1 motion of the government based on the defendant's substantial assistance;
- ☐ based on a government motion pursuant to an early disposition program;
- ☐ based on a binding plea agreement for departure which the court has accepted (cite below reason, if applicable);
- ☐ based on a plea agreement which cites the below reason for departure, which the court finds to be justified; or
- ☐ based on a plea agreement which states that the government will not oppose a defense departure motion and cites the below reason.

Pursuant to a Motion Not Addressed in a Plea Agreement

- ☐ pursuant to a 5K1.1 motion of the government based on the defendant's substantial assistance;
- ☐ pursuant to a government motion based on the below reason for departure; or
- ☐ pursuant to a defense motion based on the below reason for departure to which the government has not objected; or
- ☐ pursuant to a defense motion based on the below reason for departure to which the government has objected.

☐ Other than plea agreement or motion by the parties based on the below reason for departure.

Reason(s) for Departure

☐ 4A1.3 Criminal History Adequacy	☐ 5K2.8 Extreme Conduct	☐ 5K2.16 Voluntary Disclosure of Offense
☐ 5K2.0 Aggravating or Mitigating Circumstances (explain):	☐ 5K2.9 Criminal Purpose	☐ 5K2.17 High-Capacity Semiautomatic Firearm
☐ 5K2.1 Death	☐ 5K2.10 Victim's Conduct	☐ 5K2.18 Violent Street Gang
☐ 5K2.2 Physical Injury	☐ 5K2.11 Lesser Harm	☐ 5K2.20 Aberrant Behavior
☐ 5K2.3 Extreme Psychological Injury	☐ 5K2.12 Coercion and Duress	☐ 5K2.21 Dismissed and Uncharged Conduct
☐ 5K2.4 Abduction or Unlawful	☐ 5K2.13 Diminished Capacity	☐ 5K2.22 Age or Health of Sex Offenders
☐ 5K2.5 Property Damage or Loss	☐ 5K2.14 Public Welfare	☐ 5K2.23 Discharged Terms of Imprisonment
☐ 5K2.6 Weapons and Dangerous	☐	☐ 5K3.1 Early Disposition, "fast-track" Program
☐ 5K2.7 Disruption of Government	☐	☐

☐ Other (e.g., 2B1.1 commentary, 5H1.1-5H1.6 or 5H1.11) (explain and state guideline and/or statutory basis). (Use Page 3, if necessary.)

STATEMENT OF REASONS

(Not for Public Disclosure)

ADDITIONAL PRESENTENCE REPORT AND GUIDELINE APPLICATION CHANGES (If necessary.)

SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS (If necessary.)

The Court determined that, considering all the factors under 18 U.S.C. 3553(a), the Defendant's explicit withdrawal from the conspiracy almost four years before the filing of the Indictment, the Defendant's post-offense conduct, especially obtaining a college degree and the start of his own successful business, the support of family and friends, lack of criminal history, and his age at the time of the offense conduct, all warrant the sentence imposed, which was sufficient, but not greater than necessary to serve the purposes of sentencing.

ADDITIONAL COMMENTS OR FINDINGS CONCERNING INFORMATION IN PRESENTENCE REPORT (If necessary.)

ADDITIONAL REASONS FOR DEPARTING FROM THE GUIDELINE RANGE (If necessary.)

Defendant's Soc. Sec.
484-08-0447

Defendant's Date of
January 6, 1979

Defendant's Residence Address:
825 Walnut Street
Iowa City, Iowa 52240

Defendant's Mailing Address : Same

May 27, 2005
Date of Imposition
of Judgment

/s/: Robert W. Pratt
Signature of Judge

Robert W. Pratt,
U.S. District Judge
Name and Title of Judge

May 27, 2005
Date Signed

UNITED STATES DISTRICT COURT
S.D. IOWA

No. 4:04-CR-116

UNITED STATES OF AMERICA,
Plaintiff,

v.

BRIAN MICHAEL GALL,
Defendant.

June 2, 2005

SENTENCING MEMORANDUM

PRATT, *District Judge.*

I. INTRODUCTION

On May 27, 2005, this Court sentenced the Defendant, Brian Michael Gall to a thirty-six month term of probation. This memorandum sets forth the methodology and reasoning for that sentence.

On March 2, 2005, the Defendant pleaded guilty to one count of conspiracy to distribute MDMA, also known as "ecstacy", a Class C felony. *See* 21 U.S.C. §§ 846, 841(b)(1)(C). In fashioning a sentence that is "sufficient, but not greater than necessary, [the Court must consider] the nature and circumstances of the offense and the history and characteristics of the defendant. . . ." 18 U.S.C. § 3553(a)(1).

Further, the Court must consider the need for the sentence imposed, in that it should: reflect the seriousness of the offense, promote respect for the law, and provide just punishment; afford adequate deterrence to criminal conduct; protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment. 18 U.S.C. § 3553(a)(2). Along with these factors, the Court must determine the kinds of sentences available, including those advised by the Sentencing Commission. 18 U.S.C. §§ 3553(a)(3)-(5); *see United States v. Yahnke*, 395 F.3d 823, 824 (8th Cir.2005) (requiring that a sentencing court "must consult Guidelines and take them into account when sentencing"); *United States v. Mathijssen*, 406 F.3d 496, 498 (8th Cir.2005) (reviewing a district court's interpretations of the Guidelines *de novo*, factual findings for clear error, and the final sentencing determination for reasonableness). The Court must also "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" and assess the need to provide restitution to victims. 18 U.S.C. §§ 3553(a)(6), (7). Finally, because a term of imprisonment is available in this case, the Court must heed the statutory admonition "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a).

II. DISCUSSION

A. Advisory Guidelines Range

The Presentence Report calculation, which the Court adopts, subjects the Defendant to a total offense level of 24 based on the quantity of 10,000 MDMA tablets stipulated to by the parties. This amount converts to 87.5 kilograms of marijuana. The Defendant, however, received a two-point reduction under U.S.S.G. § 5C1.2 for being "safety valve" eligible. The Defendant also received a three-point adjustment for acceptance of responsibility. Taking these reduc-

tions into account, the final offense level calculation is 19.

The Defendant's criminal history is minimal, falling into criminal history category one ("I"). The Defendant's single criminal history point arises from conduct when, at the age of eighteen, the Defendant paid a fine for failure to zip a gun bag, which lay inside a motor vehicle while on a hunting trip. The Defendant pled guilty to two other infractions, as will be discussed below, but the associated conduct did not earn the Defendant any criminal history points under the Guidelines. Accordingly, the advisory Guidelines sentencing range for this Defendant is between 30 and 37 months.

B. Departure Motions

The Defendant made several motions for downward departures from the Guidelines calculation above based on the Defendant's age, cooperation with the government,[1] remorse, and post-offense rehabilitation. Because these factors are more aptly considered under the statutory factors listed in 18 U.S.C. § 3553(a), they are denied. The Defendant also moves for a downward departure based on acceptance of responsibility. Since he has already received a three-point reduction for acceptance, that motion is also denied. *See* U.S.S.G. § 5K2.0(d) (prohibiting such a departure because it is already taken into account under § 3E1.1). Finally, the Defendant moves for downward departures based on the arguments that the Defendant's offense conduct was aberrant and that the Defendant voluntarily withdrew from the conspiracy well before the Indictment was filed in this case.

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[1] The Government filed no substantial assistance motion in this case. The Government conceded that, while the Defendant was receptive to providing testimony at the trials of co-defendants and other information, since his offense conduct occurred almost four years before the Indictment was filed, whatever information the Defendant could reveal was of little use. Ironically, by the time the Defendant provided information, the individuals he knew about had already confessed or were cooperating themselves.

The Court cannot conclude the Defendant's offense conduct was aberrant behavior and, therefore, declines to downwardly depart on that basis. Under the policy statement, a court may depart downward "if the defendant committed a single criminal occurrence or single criminal transaction that: 1) was committed without significant planning; 2) was of limited duration; and 3) represents a marked deviation by the defendant from an otherwise law-abiding life." U.S.S.G. § 5K2.20. The facts, as stipulated by the parties, show that Defendant's offense conduct involved a conspiracy that lasted for at least seven months and included numerous criminal transactions. Conspiracy, by its very nature, almost completely forecloses a finding of aberrant behavior as a basis for downward departure because it invariably involves a degree of planning and is not, except in rare cases, an act of limited duration.

Neither can the Court find the Defendant's voluntary termination from the conduct prior to law enforcement intervention constitutes a basis for departing downward. The Defendant relies on *United States v. Nunemacher*, 362 F.3d 682, 689 (10th Cir.2004), which allowed a district court to consider downwardly departing for a defendant's voluntary termination of criminal conduct before such conduct was brought to the attention of law enforcement. The Tenth Circuit reasoned that voluntary termination reflected that the criminal conduct was atypical and, therefore, worthy of consideration for a departure, if exceptional. *See id.* at 688 ("[V]oluntary termination of illegal activity and cooperation with law enforcement are already taken into account by an acceptance of responsibility adjustment . . . thus may not serve as a basis for departure unless [they] are present to an exceptional degree.") (citing *United States v. Benally*, 215 F.3d 1068, 1075 (10th Cir.2000)). Voluntary termination likewise comes under consideration in the Eighth Circuit when a defendant's acceptance of responsibility is an issue. *United States v. Card*, 390 F.3d 592, 594 n. 3 (8th Cir.2004)

(relying on a district court's application of U.S.S.G. 3E1.1 n. 1(b) to determine whether a defendant accepted responsibility for his conduct). Here, the Defendant has already received a three-point reduction in his offense level for acceptance and his voluntary termination, after seven months and numerous criminal transactions, cannot be said to be so exceptional as to make his criminal conduct atypical. The Defendant's withdrawal from the conspiracy is better discussed within the confines of 18 U.S.C. § 3553(a).

C. Imposition of Sentence

1. *The Nature and Circumstances of the Offense*

The Defendant is charged with entering and exiting a conspiracy that involved the distribution of MDMA. The overall conspiracy occurred from May, 1996 to on or about October 30, 2002. The Defendant's involvement began with the purchase, for the purpose of distribution, of MDMA in February, 2000. The Defendant's involvement ended in September, 2000. In September, 2000, the Defendant informed a coconspirator that he was getting out of the drug business and wanted nothing more to do with the conspiracy. No other aggravating factors are present. None of the offense conduct involved violence, nor were firearms present. The offense level is derived solely on the basis of drug amounts. The Defendant believed that, up until the Indictment was filed in April, 2004, his criminal conduct was all part of the past.

2. *The Character of the Defendant*

The Defendant's criminal-history conduct has been alluded to and appears to stem from his addictions to drugs and alcohol. Other than the firearm offense discussed above, the Defendant pleaded guilty, at the age of eighteen, to failure to maintain control of his vehicle and was ticketed for underage drinking of alcohol. In March, 2000, contemporaneous with the time of the offense conduct in the present case, the De-

fendant pleaded guilty to possession of marijuana, for which he received a one year deferred judgment. In fact, all of the Defendant's criminal conduct, including the present offense, occurred when he was twenty-one-years old or younger.[2]

To the Defendant's credit, he voluntarily and explicitly withdrew from the conspiracy in September, 2000.[3] In addi-

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[2] Immaturity at the time of the offense conduct is not an inconsequential consideration. Recent studies on the development of the human brain conclude that human brain development may not become complete until the age of twenty-five. *See* Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, Wash. Post, Feb. 1, 2005 at A01 (summarizing a recent National Institutes of Health ("NIH") study that suggests "that the region of the brain that inhibits risky behavior is not fully formed until age 25"). This is of critical importance in the area of criminal law. The Sentencing Commission, in its studies, has deduced that recidivism rates drop as the age of defendants increase. *See United States v. Nellum*, No. 2:04-cr-30-ps, 2005 WL 300073 (N.D.Ind. Feb. 3, 2005). The Supreme Court based its most recent death penalty decision, *Roper v. Simmons*, on studies indicating adolescents are less culpable for their actions than adults. *See* ___ U.S. ___, ___, 125 S.Ct. 1183, 1195, 161 L.Ed.2d 1 (2005) (stating that "as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' (citations omitted) It has been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behavior.'") (quoting Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Review 339 (1992)). While the *Roper* court held imposition of the death penalty is unconstitutional for those persons who committed the death-eligible crime before the age of eighteen, the recent NIH report confirms that there is no bold line demarcating at what age a person reaches full maturity. While age does not excuse behavior, a sentencing court should account for age when inquiring into the conduct of a defendant.

[3] The Government estimates that the Defendant made between $30,000 and $40,000 during his time in the conspiracy. Like so many facts to be considered when a court imposes a sentence, this fact can be viewed from

tion, the Defendant's post-offense behavior has been exemplary. The Defendant continues to wage a successful battle against drug and alcohol addictions; he has remained sober while on bond under pre-trial and pre-sentence release. After turning his back on the conspiracy, the Defendant earned his bachelor of science degree in computer science from the University of Iowa. The Defendant started, and continues to own and operate BMG Construction Services, which operates as a sub-contracting service for the installation of Pella-brand windows and doors. Representatives of the Pella Corporation have written to the Court describing the Defendant as "reliable, honest, friendly, and polite," with a "superior work ethic . . . and a valuable resource." Soon the Defendant's company will begin a significant construction project, the replacement of windows and doors at Northwestern University in Evanston, Illinois. The Court has also received a small flood of letters from family, friends, and work colleagues attesting to the Defendant's character.

3. *The Need for the Sentence Imposed*

The Court can only conclude from Defendant's post-offense conduct that he has, in fact, learned from his experience with the United States criminal justice system, and has admirably moved to secure a better future for himself. The Court, however, is bound to impose a sentence that reflects the seriousness of joining a conspiracy to distribute MDMA.

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different perspectives. On the one hand, the Defendant should be punished for profiting from a criminal scheme. The Government argues that this can best be met by a sentence near the bottom of the advisory Guidelines sentencing range, i.e., thirty months imprisonment. On the other hand, the Defendant, who is from a working-class family and has few financial resources, decided to turn his back on what, for him, was a highly profitable venture. The Presentence Report, paragraph 72, characterizes the profits as "easy money." The Court can not consider, for the purposes of sentencing, one side of the financial aspect of the offense conduct without considering the other.

This is best accomplished, in this case, by a term of Probation for three years with appropriate conditions. *See* 18 U.S.C. § 3561(a) (allowing for probation for offenses other than Class A or Class B felonies). The Court reminds the Defendant that "probation is not an act of leniency. Probation is a substantial restriction of freedom, it is not forgiveness, and it is not an endorsement of the offense." *State v. Peckenschneider*, 236 N.W.2d 344, 353 (Iowa 1975) (McCormick, J., dissenting). The Defendant will have to comply with strict reporting conditions along with a three-year regime of alcohol and drug testing. He will not be able to change or make decisions about significant circumstances in his life, such as where to live or work, which are prized liberty interests, without first seeking authorization from his Probation Officer or, perhaps, even the Court. Of course, the Defendant always faces the harsh consequences that await if he violates the conditions of his probationary term.[4]

Any term of imprisonment in this case would be counter effective by depriving society of the contributions of the Defendant who, the Court has found, understands the consequences of his criminal conduct and is doing everything in

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[4] Along with the mandatory conditions of probation, the Court also provides the following conditions under 18 U.S.C. § 3563(b), which are in keeping with the factors set forth in §§ 3553(a)(1) and (a)(2): 1) You shall participate in a program of testing and treatment for substance abuse, as directed by the Probation Officer, until such time as you are released from the program by the Probation Office; 2) You shall not use alcohol and/or other intoxicants during and after the course of treatment; 3) You shall submit to a mental health evaluation and participate in treatment, if recommended, which may include compliance with any medical regime recommended by treatment personnel, as directed by the Probation Officer; 4) You shall not patronize business establishments where more than fifty percent of the revenue is derived from the sale of alcoholic beverages; and 5) You shall work only at employment approved by the U.S. Probation Office. You shall consult the U.S. Probation Office prior to any changes in employment. You shall not terminate any employment without prior approval from the U.S. Probation Office.

his power to forge a new life. The Defendant's post-offense conduct indicates neither that he will return to criminal behavior nor that the Defendant is a danger to society. In fact, the Defendant's post-offense conduct was not motivated by a desire to please the Court or any other governmental agency, but was the pre-Indictment product of the Defendant's own desire to lead a better life. Indeed, a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.

III. CONCLUSION

The introductory commentary to Part B-Probation of the Sentencing Guidelines states that: "Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet the fully statutory purposes of sentencing, including promoting respect for the law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant." The Court recognizes that, according the Sentencing Guidelines, Probation is not recommended when, as in this case, the Guidelines range falls outside of Zone A.[5] Nevertheless, the Court finds that the

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[5] This is because the offense level in this case, based solely on drug quantity, subjects the Defendant to a final offense level of 19. Other courts have recognized, however, that for a variety of reasons, the Guidelines calculations based on drug amount may overrepresent the actual offense conduct. *See United States v. Smith*, 359 F.Supp.2d 771, 776 (E.D. Wis.2005) (noting that defendant's offense level would have been reduced by six levels if he was responsible for powder instead of crack cocaine); *United States v. Nellum*, No. 2:04-cr-30-ps, 2005 WL 300073 at *5 (N.D.Ind. Feb. 3, 2005) (describing the system of drug quantities as random as it is played out in reality); *United States v. Huerta-Rodriguez*, 355 F.Supp.2d 1019, 1026 n. 6 (D.Neb.2005) (stating that "the quantity system was developed to punish bigger distributors more harshly, but practice of charging conspiracies over a long period of time has the result

circumstances of the offense and the character of the Defendant, for the reasons set forth above, warrant a sentence of Probation as being sufficient, but not greater than necessary, to comply with the statutory mandates of 18 U.S.C. § 3553(a).

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of aggregating many small distributions so as to make a long-term small quantity distributor look like a large-quantity distributor"). While not denigrating the seriousness of the crime in the present case, the Court finds the offense level, based solely on drug quantity, does not adequately reflect the offense conduct.

The Government argues that, because the offense level in this case is derived from the 1999 Guidelines and not a subsequent Guidelines, the Defendant already receives a benefit. Because, had the conduct occurred later, the Defendant would be subject to a higher sentencing range. This reasoning stems from harsher Guidelines sentencing ranges in drug trafficking cases based on drug amounts. This is no argument. The "benefit" of the 1999 calculation incurred by the Defendant was the result of his own decision to withdraw from the conspiracy. The Sentencing Commission did not raise the offense level associated with the same drug quantity in order to benefit those who had already committed the crime or to somehow reward them for engaging in earlier criminal conduct, but to reflect Congressional intent to toughen sentences for those involved in drug trafficking.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

Criminal No. 04-116

UNITED STATES OF AMERICA,
Plaintiff,

v.

BRIAN MICHAEL GALL,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Eighth Circuit, pursuant 18 U.S.C. § 3731, from the judgment (Docket # 200) entered in this case on the 27th day of May, 2005.

Dated: June 24, 2005

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 05-3001

UNITED STATES OF AMERICA,
Appellant,

v.

BRIAN MICHAEL GALL,
Appellee.

Submitted: Feb. 14, 2006
Filed: May 12, 2006
Rehearing and Rehearing En Banc Denied July 7, 2006.*

Before LOKEN, *Chief Judge*, BOWMAN and SMITH, *Circuit Judges*.

SMITH, *Circuit Judge*.

Brian Michael Gall pleaded guilty to conspiracy to distribute a mixture and substance containing methylenedioxymethamphetamine ("MDMA"), a Schedule I controlled substance, in violation of 21 U.S.C. §§ 841(b)(1)(C) and 846. The district court imposed a sentence of 36 months' probation and a $100 special assessment. The government appeals the sentence, arguing that it is unreasonable. We conclude that Gall's sentence is unreasonable. Accordingly, we remand the case for resentencing.

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* Judge Steven M. Colloton took no part in the consideration or decision of this matter.

I. *Background*

In February or March 2000, Gall entered into an agreement with Luke Rinderknect and others to distribute MDMA, also known as ecstacy. Initially, Gall purchased 100 ecstasy tablets from Rinderknect on six occasions between February and May 2000. During this period, Gall traveled from Iowa City, Iowa, to Pell, Iowa, to purchase ecstasy from Rinderknect.

In May 2000, Rinderknect decided to move to Burbank, California. Before leaving Iowa, he arranged a meeting with Gall and Theodore Sauerberg to facilitate the ongoing distribution of ecstasy in his absence. During the meeting, the parties agreed that Sauerberg would accept delivery of ecstasy from Rinderknect and transfer the drugs to Gall. When Gall received the drugs from Sauerberg, he distributed them to other individuals, including Ross Harbison, Jason Story, Brooks Robinson, Mark Goodding, and Corey Coleman. After receiving payment from his customers, Gall delivered the drug proceeds to Sauerberg. Sauerberg then delivered the cash to Rinderknect.

One month after the initial meeting in Iowa City, Rinderknect mailed a package containing 5,000 tablets of ecstasy to Sauerberg in Iowa City. Sauerberg then distributed the ecstasy to Gall in 1,000 tablet increments. Pursuant to the agreement, Gall distributed the ecstasy to other individuals, including Coleman who purchased a total of 1,500 to 2,000 tablets. Gall knew his customers were redistributing the drugs within the community. As the drugs were distributed, Gall paid Sauerberg for the ecstasy. After Sauerberg collected the $85,000 purchase price from Gall, he contacted Rinderknect who flew to Iowa and obtained the cash.

Approximately one to two months later, Rinderknect mailed a second package containing 5,000 tablets of ecstasy to Sauerberg in Iowa City. Again, Sauerberg distributed the ecstasy to Gall in 1,000 tablet increments. After distributing

the ecstasy, Gall remitted $85,000 to Sauerberg, who delivered the money to Rinderknect.

In September 2000, Gall decided to leave the drug conspiracy. Rinderknect traveled to Iowa City and met with Gall. Gall told Rinderknect that he was getting out of the drug business over concerns that Sauerberg was telling too many people about their ecstasy distribution business. Rinderknect sold no more ecstasy to Gall as he requested. According to Gall, he stopped selling ecstasy in August 2000 when he moved in with a new roommate and started studying for his major at the University of Iowa. Goodding testified that Gall stopped selling ecstasy in August 2000 because he did not like the trouble of having to deal with people. Gall estimated that he made $30,000 while a member of the ecstasy conspiracy.

After college graduation in 2002, Gall moved to Mesa, Arizona. Federal agents approached Gall in Arizona, requesting to speak with him about his involvement with ecstasy sales while living in Iowa. Unknown to Gall, law enforcement had already arrested Rinderknect and Sauerberg, who had implicated Gall. Gall admitted to the agents his involvement in the conspiracy. In 2004, Gall was charged in an indictment with conspiracy to distribute MDMA. Gall made arrangements to return to Iowa from his home in Winter Park, Colorado, when he learned there was a federal arrest warrant issued for him. Upon his return to Iowa, he turned himself in to federal authorities.

Because Gall withdrew from the conspiracy in September 2000, the parties stipulated that the November 1, 1999 edition of the United States Sentencing Guidelines applied to Gall's offense conduct. The presentence report ("PSR") assigned Gall responsibility for 10,000 tablets of ecstasy. The parties stipulated that for the purpose of calculating a Guidelines sentence, Gall would be held accountable for 2,500 grams of ecstasy, or 10,000 tablets, which under the 1999 Guidelines

equals 87.5 kilograms of marijuana. Pursuant to U.S.S.G. § 2D1.1, 87.5 kilograms of marijuana placed Gall at a base offense level of 24. Because he qualified for the safety valve pursuant to U.S.S.G. § 5C1.2, Gall's offense level was reduced by two levels to 22. An additional three-level reduction for acceptance of responsibility resulted in a total offense level of 19.

Gall's criminal history included a conviction for failure to maintain control of his vehicle and underage alcohol possession in March 1997. As part of his sentence, Gall was ordered to pay a fine and undergo treatment for alcohol abuse. No criminal history points were assessed for this conviction pursuant to U.S.S.G. § 4A1.2(c). Gall was also convicted in December 1997 of improper storage of a firearm on a public highway. This conviction added one criminal history point pursuant to U.S.S.G. § 4A1.1(c). Finally, in March 2000, Gall was convicted of possession of marijuana for which he received a deferred judgment; no criminal history points were assigned to this conviction. With a Category I criminal history, Gall's advisory Guidelines range was 30 to 37 months' imprisonment.

At Gall's sentencing hearing, his father, Tom Gall, testified that he had observed a change in his son's life and that his son had started his own business and was doing well. He added that contractors rely on his son for expertise in installing windows. Finally, he commented that his family would be devastated if his son went to jail.

Gall's mother, Vicki Gall, testified that she believed her son realizes that he made a "stupid mistake" and that he has really learned from it. She added that during the last year, her son has become more mature. She concluded by questioning the value of incarcerating someone who had already made positive changes in his life.

Gall's counsel requested a sentence of probation, asserting that Gall was not in need of rehabilitation because he had

already done an admirable job of rehabilitating himself. His counsel noted letters of support sent to the district court sent by Gall's friends and family. In addition, his counsel argued that a felony conviction is a severe consequence that would follow Gall throughout his life. Gall's counsel distinguished Gall from the codefendants who received prison sentences by noting Gall's withdrawal from the conspiracy and his assumption of a crime-free lifestyle. Counsel concluded his remarks by reminding the court that Gall's family, along with two contract employees, "work pretty much exclusively for Mr. Gall" and were depending on Gall.

The government requested a sentence of 30 months' imprisonment, a sentence at the low end of the advisory Guidelines range. The government argued this sentence was appropriate, considering Gall already received a significant benefit by being sentenced under the 1999 Guidelines. In 1999, the Guidelines stated that 1 gram of ecstasy equated to 35 grams of marijuana. The current Guidelines equate 1 gram of ecstasy to 500 grams of marijuana, which is 14 times the conversion quantity that Gall faced. In addition, Gall's recommended sentence only included drug quantities for the period of his participation in the conspiracy not foreseeable drug quantities during the entire conspiracy. Also, Gall benefitted from a two-level safety-valve reduction. Finally, the government argued that a 30-month sentence was appropriate because the other coconspirators also received prison sentences.

Before announcing its sentence, the district court denied a defense request to depart from the advisory Guidelines range based upon aberrant behavior and extraordinary acceptance of responsibility. The court concluded that departure requests for remorse, post-offense rehabilitation, and voluntary cessation of criminal activity were best considered within the confines of 18 U.S.C. § 3553(a).

After considering the Guidelines, the district court stated, both at the hearing and in its subsequent sentencing memo-

randum, that it was going to impose a sentence other than that contemplated by the Guidelines and sentenced Gall to 36 months' probation. In imposing the sentence of probation, the court stated that it had considered the § 3553(a) factors. Particularly, the court stated that it took into account "the defendant's voluntary and explicit withdrawal from the conspiracy in September of 2000; the defendant's exemplary behavior while on bond; the support manifested by family and friends who have attested to the defendant's character; the lack of criminal history, especially a complete lack of any violent criminal history; and the immaturity of the defendant."

Regarding the nature and circumstances of the offense under § 3553(a)(1), the district court noted that Gall had withdrawn from the conspiracy, the offense did not involve violence or firearms, and the offense level was derived solely on the basis of drug amounts.

As to the character of the defendant, the court stated that all of Gall's criminal conduct, including the present offense, occurred when he was 21 years old or younger, citing the Supreme Court's analysis in *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), that studies indicate that adolescents are less culpable than adults for their actions and "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." While acknowledging the decision's limited applicability to those who commit a death-eligible crime before the age of 18, the district court concluded that a National Institute of Health Study "confirms there is no bold line demarcating at what age full maturity is reached." Therefore, the court determined that Gall's age at the time of the offense should be considered in "discovering the overall characteristics of the defendant."

In addition, the court noted Gall's "exemplary" post-offense behavior, including earning his college degree and owning his own business. The court referred to the correspondence it had received, which described Gall as "reliable, honest, friendly, and polite" with "superior work ethic and valuable resources." The district court stated that it could "only conclude from the defendant's post-offense conduct that he has, in fact, learned from his experience with the United States criminal justice system and admirably moved to secure a better future for himself."

Finally, under § 3553(a)(2)(A), the court considered the need for the sentence imposed to reflect the seriousness of the offense. The court stated that the best way to accomplish this goal was to impose a term of probation because "[a]ny term of imprisonment in this case would be counter effective by depriving society of the contributions of the Defendant who, the Court has found, understands the consequences of his criminal conduct and is doing everything in his power to forge a new life."

The district court sentenced Gall to a term of 36 months' probation as a reflection of "the seriousness of joining a conspiracy to distribute MDMA or Ecstacy." Recognizing that probation is not recommended when the Guidelines range falls outside of Zone A, the district court concluded that probation was nevertheless appropriate because Gall's offense level was based "solely on drug quantity." The court stated, "While not denigrating the seriousness of the offense conduct in this case, the Court finds the offense level based solely upon drug quantity does not adequately reflect the offense conduct."

The government now appeals, arguing that the sentence is unreasonable in light of all of the § 3553(a) factors because the district court (1) gave unreasonable weight to Gall's withdrawal from the conspiracy; (2) improperly relied on studies showing that adolescents are less culpable for their

actions than adults; (3) gave unreasonable weight to Gall's post-offense rehabilitation and behavior while on pre-trial release; (4) failed to acknowledge that Gall's lack of criminal history was accounted for in the Guidelines calculation; (5) incorrectly concluded that a sentence of probation reflects the seriousness of the offense; (6) did not consider whether a sentence of probation affords adequate deterrence to future criminal conduct; and (7) did not consider whether a sentence of probation creates unwarranted sentencing disparities among defendants with similar records who committed similar crimes.

II. *Discussion*

"Under *Booker*, the sentencing guidelines are no longer a mandatory regime. Instead, the district court must take the advisory guidelines into account together with other sentencing factors enumerated in 18 U.S.C. § 3553(a)." *United States v. Claiborne*, 439 F.3d 479, 480 (8th Cir.2006). To determine the proper sentence, "the district court must first calculate the applicable guidelines sentencing range." *Id.* After calculating the advisory Guidelines range, the district court "may then impose a sentence outside the range in order to 'tailor the sentence in light of the other statutory concerns' in § 3553(a)." *Id.* (quoting *United States v. Booker*, 543 U.S. 220, 245-46, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)).

In the present case, neither party challenges the district court's determination of the Guidelines sentencing range; therefore, "we review the resulting sentence for reasonableness, a standard akin to our traditional review for abuse of discretion." *Id.* at 481.

"We have determined that a sentence imposed within the guidelines range is presumptively reasonable." *United States v. Myers*, 439 F.3d 415, 417 (8th Cir.2006). "While it does not follow that a sentence outside the guidelines range is unreasonable," a sentence outside of the Guidelines range

"'may be unreasonable if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper factor or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.'" *Id.* at 417-18 (quoting *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir.2005)).

The district court must clearly explain why it imposed a sentence outside of the Guidelines range. *United States v. Gatewood*, 438 F.3d 894, 896 (8th Cir.2006). While we do not require "a rote recitation of each § 3553(a) factor," the district court should explain why it varied from the Guidelines and the extent of the variance. *Id.* "'Sentences varying from the guidelines range . . . are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. 3553(a). How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed.'" *Claiborne*, 439 F.3d. at 481 (quoting *United States v. Johnson*, 427 F.3d 423, 426-27 (7th Cir.2005)). Therefore, "the farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be." *United States v. McMannus*, 436 F.3d 871, 874 (8th Cir.2006).

Here, the district court imposed a sentence of probation when the bottom of Gall's advisory Guidelines range was 30 months' incarceration. In essence, this amounts to a 100% downward variance, as Gall will not serve any prison time. Such a variance is extraordinary. "An extraordinary reduction must be supported by extraordinary circumstances." *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir.2005); *see also Claiborne*, 439 F.3d at 481 (holding that the district court's imposition of a 15-month sentence when the Guidelines range was 37 to 46 months' imprisonment, a 60% down-

ward variance, was unreasonable). We conclude that this extraordinary variance is not supported by extraordinary justifications.

First, the district court gave too much weight to Gall's withdrawal from the conspiracy because the court failed to acknowledge the significant benefit Gall received from being subject to the 1999 Guidelines. Gall was held responsible for 10,000 tablets of MDMA at a conversion rate of 1 gram of MDMA to 35 grams of marijuana, resulting in a base offense level of 24. Under the current Guidelines, however, Gall's base offense level would have been 32 because 1 gram of MDMA equates to 500 grams of marijuana. In addition, Gall was not held accountable for quantities of ecstasy distributed by other members of the conspiracy subsequent to his withdrawal. Under U.S.S.G. § 1B1.3, Gall could have been held responsible for other members' reasonably foreseeable acts. *United States v. Smith*, 240 F.3d 732, 737 (8th Cir. 2001) ("A defendant convicted of conspiracy is properly held accountable for all reasonably foreseeable acts and omissions of any co-conspirator taken in furtherance of the con-spiracy.").

Second, the district court gave significant weight to an improper factor when it relied on general studies showing persons under the age of 18 display a lack of maturity, which often results in impetuous and ill-considered actions. This general study, however, does not explain how Gall's specific behavior in the instant case was impetuous or ill-considered. Furthermore, Gall sold ecstacy as a 21-year-old adult, not as an adolescent.

Third, the district court did not properly weigh the seriousness of Gall's offense. While the district court observed that Gall's offense level did not adequately reflect the offense conduct because it was based "solely on drug quantity," the district court ignored the serious health risks ecstasy poses. Ecstasy causes increased body temperature, which can lead to

liver, kidney, and cardiovascular system failure; increases in heart rate and blood pressure; and severe anxiety and depression, which can occur days or weeks after taking ecstasy. *National Institute on Drug Abuse*, (2003), *at* www.nida.nih.gov/infofax/ecstasy.html (last visited March 31, 2006). Gall sold 10,000 ecstasy pills during the time he participated in the drug conspiracy. The potential harm posed by this quantity of illegal drugs should not be lightly discounted.

Fourth, the record does not show that the district court considered whether a sentence of probation would result in unwarranted sentencing disparities. *See* 18 U.S.C. § 3553(a)(6). "Congress has made avoiding unwarranted disparity a legislative priority." *United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir.2006). Therefore, we find that the district court failed to consider a relevant factor that should have received significant weight.

Finally, the district court placed too much emphasis on Gall's post-offense rehabilitation. Even if Gall's rehabilitation "is dramatic and hopefully permanent," a sentence of probation for participating as a middleman in a conspiracy distributing 10,000 tablets of ecstasy with a personal profit of $30,000 "'lies outside the limited range of choice dictated by the facts of the case.'" *Id.* (quoting *Haack*, 403 F.3d at 1004).

III. *Conclusion*

Accordingly, the judgment of the district court is reversed and the case is remanded to the district court for resentencing.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-3001

UNITED STATES OF AMERICA,
Appellant,

v.

BRIAN MICHAEL GALL,
Appellee.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

(5172-010199)

May 12, 2006

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-3001

UNITED STATED OF AMERICA,
Appellant,

v.

BRIAN MICHAEL GALL,
Appellee.

Order Denying Petition for Rehearing and
for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Steven M. Colloton took no part in the consideration or decision of this matter.

(5128-010199)

July 7, 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
JUL 18 2007
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No. 06-7949

IN THE

Supreme Court of the United States

BRIAN MICHAEL GALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether, when determining the "reasonableness" of a district court sentence under *United States* v. *Booker*, 543 U.S. 220 (2005), it is appropriate to require district courts to justify a sentence outside the range recommended by the United States Sentencing Guidelines with a finding of extraordinary circumstances.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reprinted in the Joint Appendix at J.A. 129-39. It is also available at 446 F.3d 884. The opinion of the United States District Court for the Southern District of Iowa is reprinted in the Joint Appendix at J.A. 118-27 and is also available at 374 F. Supp. 2d 758.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its judgment on May 12, 2006, see J.A. 140, and denied a petition for rehearing *en banc* on July 7, 2006, see J.A. 141. The petition for a writ of certiorari was filed on November 22, 2006, and granted on June 11, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ."

The relevant portions of the Sentencing Reform Act, as amended, 18 U.S.C. §§ 3553(a) & (c), 3742(e) & (f), 3582(a), are included as an appendix to this brief.

STATEMENT OF THE CASE

This case presents the issue that the Court could not address this past Term because of the unfortunate death of Mario Claiborne (No. 06-5618): whether the extraordinary circumstances test is inconsistent with *United States* v. *Booker*, 543 U.S. 220 (2005). The test requires that a sentence which deviates from the range recommended by the United States Sentencing Guidelines be supported by

"extraordinary circumstances." 446 F.3d at 889 (J.A. 137). In essence, it presumes such a sentence to be unreasonable in the absence of a sliding scale of affirmative proof to the contrary, which depends upon how much the sentence "deviates" from the Guidelines range. As this Court strongly suggested in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), this presumption of unreasonableness is wholly inconsistent with the "across the board" reasonableness standard set forth in *Booker* and, therefore, is both unlawful and unconstitutional. *Id.* at 2467.

Mr. Gall's Sentence

While a student at the University of Iowa in early 2000, at the age of 21 and struggling with drugs and alcohol, Brian Michael Gall met a man named Luke Rinderknecht. Mr. Rinderknecht dealt in a drug known scientifically as methylenedioxymethamphetamine ("MDMA"), popularly referred to in its tablet form as "ecstasy." Sent'g Tr. 6-7, 53 (J.A. 66); PSR 7, 14 (Sealed J.A. 151). Ecstasy produces an immediate psychedelic and energizing effect, and is a popular drug among young people. See, *e.g.*, Lloyd D. Johnston et al., *Monitoring the Future: National Results on Adolescent Drug Use 2006*, at 35-36 (2007). Mr. Gall began purchasing tablets of ecstasy from Mr. Rinderknecht and his associates, both for his own use and for resale to other college students. By September 2000, he had distributed several thousand tablets on behalf of Mr. Rinderknecht and had made $30,000 to $40,000 in profits. Sent'g Tr. 6-7 (J.A. 66); PSR 4, 7-8 (Sealed J.A. 152).

Mr. Gall then decided to change his life. Intending to focus on his classes, he stopped using drugs and alcohol in September 2000. He scheduled a meeting with Mr. Rinderknecht and declared that "he was getting out of the drug business and wanted nothing more to do with the conspiracy." 374 F. Supp. 2d at 761 (J.A. 122); see Sent'g Tr. 32-33, 44 (J.A. 86); PSR 3-5 (Sealed J.A. 148). Mr. Rinderknecht thereafter sold no ecstasy to Mr. Gall, and Mr.

Gall neither used nor sold ecstasy or any other drug. 374 F. Supp. 2d at 761-63 (J.A. 123-24); Sent'g Tr. 22-23, 32-33, 44 (J.A. 78, 94-95); PSR 5-7, 14 (Sealed J.A. 148-52). Mr. Gall continued with his studies and graduated in 2002. He then moved to Arizona and accepted a job in the construction industry. PSR 5-7, 15 (Sealed J.A. 148-52, 160-61).

A year later, while still in Arizona, Mr. Gall was approached by federal law enforcement agents. They asked whether he had been involved in a conspiracy to distribute ecstasy. Sent'g Tr. 19-20 (J.A. 75). Mr. Gall frankly admitted to his involvement with Mr. Rinderknecht. 374 F. Supp. 2d at 760 n.1 (J.A. 120); Sent'g Tr. 19-22, 30 (J.A. 75). The agents took no other action at that time.

More than a year later, and four years after his involvement with Mr. Rinderknecht, the Government charged Mr. Gall with conspiracy to distribute ecstasy. Indictment (J.A. 8). Upon learning of the indictment, Mr. Gall voluntarily returned to Iowa and surrendered to federal authorities. Sent'g Tr. 19-24, 30 (J.A. 75-79). During a subsequent debriefing, he again acknowledged his involvement in the conspiracy and provided information concerning its conduct. He was then released on his own recognizance. *Id.* (J.A. 75-79). He resettled in Iowa and has since opened his own construction business, which has been quite successful and employed several individuals. 374 F. Supp. 2d at 762-63 (J.A. 123-24); Sent'g Tr. 19-21 (J.A. 75-77); PSR 13 (Sealed J.A. 157).

On March 2, 2005, shortly after this Court decided *Booker*, Mr. Gall pleaded guilty to conspiracy to distribute a controlled substance. See 21 U.S.C. §§ 841(b)(1)(C), 846. An accompanying plea agreement recites that the maximum sentence for the offense is twenty years' imprisonment, that there is no applicable mandatory minimum, and that the final sentence to be imposed is solely within the discretion of the District Court. Plea Agr. 2-3 (J.A. 13). It also stipulates that, because Mr. Gall withdrew from the conspiracy in September

2000, the 1999 version of the Guidelines should apply and that, in calculating the recommended Guidelines range, Mr. Gall should be held accountable for 10,000 tablets of ecstasy – the total number of tablets distributed by both Mr. Gall and his co-conspirators during Mr. Gall's participation in the conspiracy (even though Mr. Gall himself had distributed less than that amount). *Id.* at 2 n.1 (J.A. 13); PSR 4 (Sealed J.A. 146).

A presentence investigation report was prepared in advance of sentencing. PSR (Sealed J.A. 142-65). It advised that, under the Guidelines, Mr. Gall should be assigned one criminal history point[1] and that his final offense level, based on distribution of 10,000 ecstasy tablets (and after adjustments under the "safety valve" and acceptance-of-responsibility provisions), was 19. The recommended range of imprisonment was 30 to 37 months. PSR 9-12, 18-20 (Sealed J.A. 153-56, 162-65). Neither party objected to the report's Guidelines application. Sent'g Tr. 3-5 (J.A. 62-64).

Mr. Gall argued that the statutory factors of 18 U.S.C. § 3553(a) as well as the departure provisions of the Guidelines justified giving him a sentence below the "advisory" Guidelines range. Def.'s Sent'g Mem. (J.A. 26). He relied on several mitigating facts: his unilateral and unprompted post-offense rehabilitation, his age at the time of the offense, the aberrant nature of his conduct, his cooperation with authorities, his remorse, his acceptance of responsibility, and the benefits that his current business was conferring upon the community. *Id.* at 8-13 (J.A. 31-35).

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[1] The single criminal history point was assigned to Mr. Gall as a result of a conviction in December 1997 of improper storage of a firearm, arising from his failure to close a bag used to store a rifle during a hunting trip. PSR 10-12 (Sealed J.A. 155-56). No criminal points were assigned for Mr. Gall's other two offenses: a conviction in March 1997 of underage possession of alcohol, for which he paid a fine, and a conviction in March 2000 of possession of less than an ounce of marijuana, for which he received a one-year deferred judgment. *Id.* (Sealed J.A. 155-56).

The District Court denied the motion for downward departure. 374 F. Supp. 2d at 760-61 (J.A. 120). As the District Court suggested, the Guidelines explicitly discourage or even prohibit consideration of most of the facts identified by Mr. Gall. See Guidelines §§ 5H1.1, 5H1.4, 5H1.11, 5K2.0(d)(2), 5K2.16. However, the District Court stated that these facts "are more aptly considered under the statutory factors listed in 18 U.S.C. § 3553(a)." 374 F. Supp. 2d at 760-61 (J.A. 120).

Weighing the factors of § 3553(a), the District Court concluded that a sentence of probation for three years was "sufficient, but not greater than necessary," to satisfy the relevant purposes of punishment. *Id.* at 761-64 (J.A. 122-26). In a detailed and carefully reasoned opinion, the District Court found that Mr. Gall had entered into the conspiracy as a result of immaturity and drug addiction, had later voluntarily withdrawn from the conspiracy and stopped using drugs, had been completely forthcoming about his involvement in the crime when approached by law enforcement agents, and had since become a law-abiding and productive member of society – a finding supported by the "small flood" of letters from Mr. Gall's family, friends and work colleagues. *Id.* at 761-63 (J.A. 122-24). The experienced federal district judge saw no need to sentence Mr. Gall to a term of imprisonment in light of his successful and self-initiated rehabilitation and the low likelihood of recidivism; in fact, the District Court stated that doing so would negatively impact Mr. Gall's progress and would promote "not respect, but derision, of the law." *Id.* at 763 (J.A. 126).

At the same time, the District Court stressed that a sentence of probation is "not an act of leniency" but a "substantial restriction of freedom." *Id.* (J.A. 126). The terms of Mr. Gall's sentence require him to report regularly to a probation officer, to submit to searches of his home and person, to submit to substance abuse testing, and to participate in drug and mental health treatment as directed by the probation

officer. Judgment 2-3 (J.A. 106-107). He is prohibited from leaving the jurisdiction or transferring employment without approval from the probation officer. Mr. Gall's sentence also bars him from patronizing any establishment engaged primarily in the sale of alcoholic beverages. *Id.* (J.A. 109). These restrictions, the District Court determined, represent "just punishment" for the offense and properly balance the purposes of sentencing. 374 F. Supp. 2d at 761-64 (J.A. 122-26).

Appellate Review

The Government appealed Mr. Gall's sentence, and the Eighth Circuit reversed. 446 F.3d at 885 (J.A. 129). Characterizing the sentence as a "100% downward variance" from the Guidelines range, the Eighth Circuit stated that "[a]n extraordinary reduction must be supported by extraordinary circumstances." *Id.* at 889 (J.A. 137) (quoting *United States* v. *Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005)). The court of appeals criticized the sentencing judge for giving "too much weight" to Mr. Gall's withdrawal from the conspiracy, his age at the time of the offense, and his post-offense rehabilitation and for not "properly weigh[ing]" the seriousness of the offense and the need to avoid unwarranted sentencing disparities. *Id.* at 889-90 (J.A. 138).

The Eighth Circuit offered a number of specific points in support of its decision. It reasoned that the chosen sentence was unwarranted because Mr. Gall had already received a "significant benefit" from being sentenced under the 1999 version of the Guidelines rather than later versions which recommended higher sentences for ecstasy distribution, see *id.* (J.A. 138) – despite the fact that *ex post facto* principles prohibited application of the later versions, see Guidelines § 1B1.11. Similarly, the court of appeals asserted that Mr. Gall had benefited from the District Court's decision not to hold him "accountable for quantities of ecstasy distributed by other members of the conspiracy *subsequent* to his withdrawal," see 446 F.3d at 890 (emphasis added) (J.A. 138)

– although Mr. Gall could not legally have been held accountable for these quantities, see Guidelines § 1B1.3 cmt. n.2, illus. c (noting that an individual involved in a drug conspiracy is accountable only for the drugs distributed during the period in which he or she has agreed to participate in the conspiracy). The Eighth Circuit also criticized the District Court's observation that Mr. Gall's immaturity may have played a role in the offense, see 446 F.3d at 890 (J.A. 138) – particularly its reliance upon studies such as those suggesting that "human brain development may not become complete until the age of twenty-five," see 374 F. Supp. 2d at 762 n.2 (J.A. 123) – without ever explaining why scientific literature could not be used to bolster the conclusion that Mr. Gall's participation in the conspiracy was aberrant and that he is unlikely to return to such behavior. Finally, the court of appeals stated bluntly that the District Court "ignored the serious health risks ecstasy poses," see 446 F.3d at 890 (J.A. 138) – even though the District Court plainly acknowledged during the sentencing hearing that distribution of ecstasy was a serious offense, see Sent'g Tr. 47, 50 (J.A. 97, 99). Based on these purported errors in the District Court's judgment, the Eighth Circuit deemed the sentence unreasonable. 446 F.3d at 890 (J.A. 139).

SUMMARY OF ARGUMENT

The Government has conceded, as it must, that a presumption of unreasonableness for non-Guidelines sentences is unlawful and unconstitutional. See Brief for United States at 34-35, *Rita*, 127 S. Ct. 2456 (No. 06-5754). And yet the extraordinary circumstances test, as applied by the Eighth Circuit in reversing the judgment of sentence in this case, establishes just such a presumption for sentences outside the Guidelines. Under the test, the courts of appeals will not, in any case, find a non-Guidelines sentence reasonable absent affirmative proof in support thereof and will further require that, the more extensive the deviation from the recommended range, the greater the affirmative

proof – or the more "extraordinary" the circumstances – must be. This standard is plainly contrary to the Constitution and the Sentencing Reform Act, as interpreted by this Court in *Booker* and *Rita*.

Implementation of an "extraordinary circumstances" or "proportionality" test will necessarily lead to the same constitutional defects inherent in the mandatory Guidelines system, which this Court rejected in *Booker*. The Sixth Amendment is implicated when "the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede)." *Rita*, 127 S. Ct. at 2466 (emphasis in original). The extraordinary circumstances test does nothing less. It provides that a district court cannot impose a sentence outside the range recommended by the Guidelines unless the judge finds "extraordinary" facts in addition to those reflected in the verdict or plea. For this reason alone, the extraordinary circumstances test must be rejected.

In addition to its constitutional flaws, the extraordinary circumstances test also poses a host of statutory problems. The Sentencing Reform Act vests discretion in the sentencing judge to weigh the factors and purposes relevant to sentencing and to decide upon the sentence that is "sufficient but not greater than necessary" to achieve those ends. § 3553(a). The extraordinary circumstances test infringes upon this discretion. It compels the district court to impose sentence within the range recommended by the Guidelines, notwithstanding the court's assessment of the relevant factors and determination of the appropriate sentence.

Moreover, the test violates this Court's admonitions in *Rita* and *Booker* that reasonableness review should be highly deferential. Under this standard, courts of appeals should overturn a judgment as "unreasonable" only if the district court abused its discretion by failing to comply with the statute or by imposing a sentence that no rational judge in the same position could have potentially imposed. Courts

operating under the extraordinary circumstances test, however, are exercising *de novo* review over the sentence and the district court's assessment of the facts relevant thereto. This method of review is indistinguishable from the standard set forth in the statutory provision specifically excised in *Booker*. In its application, the test effectively reconstructs the same mandatory Guidelines system that *Booker* intended to dismantle.

Application of the extraordinary circumstances test infected the Eighth Circuit's opinion in this case. While purporting to recognize that the judgment of sentence should be reviewed only for abuse of discretion, the Eighth Circuit in actuality showed no deference to the District Court's findings. Relying on the extraordinary circumstances test, the court engaged in *de novo* review to determine whether, in its view, the facts of the case were sufficiently "extraordinary" to justify a sentence of probation. The sentence was reversed by the Eighth Circuit not because it represented an abuse of discretion, but because it was not the same sentence that the court of appeals would have imposed according to its independent re-weighing of the § 3553(a) factors.

The judgment of the District Court was well-supported by the record. Mr. Gall voluntarily withdrew from the conspiracy, graduated from college, and thereafter became a productive member of society. There is no reason to believe that a sentence of imprisonment was necessary to protect society or provide "just punishment"; to the contrary, there is every reason to believe, as the District Court stated, that a sentence of imprisonment would serve none of the articulated purposes of punishment, would irrevocably harm Mr. Gall, and would promote "not respect, but derision, of the law." 374 F. Supp. 2d at 763 (J.A. 126). The findings of the District Court fully justify the sentence of probation and, in fact, constitute "extraordinary circumstances" in support of the variance, even if that flawed test should have been applied. The decision of the Eighth Circuit should be

reversed with instructions to affirm the judgment of the District Court.

ARGUMENT

I. THE EXTRAORDINARY CIRCUMSTANCES TEST ESTABLISHES A PRESUMPTION OF UNREASONABLENESS THAT IS CONTRARY TO THE HOLDINGS IN *BOOKER* AND *RITA*.

The extraordinary circumstances test establishes a presumption of unreasonableness for sentences outside the range recommended by the Guidelines. Under that test, all sentences outside the recommended range are invalid unless the sentencing court finds supplemental facts that may be deemed sufficiently "extraordinary" to demonstrate that the calculated Guidelines sentence is inappropriate.[2] See, *e.g.*,

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[2] Eight courts of appeals have expressly adopted the "extraordinary circumstances test," or some variant thereof. *See United States* v. *Smith*, 445 F.3d 1, 4 (1st Cir. 2006); *United States* v. *Moreland*, 437 F.3d 424, 434 (4th Cir.), *cert. denied*, 126 S. Ct. 2054 (2006); *United States* v. *Armendariz*, 451 F.3d 352, 358 (5th Cir. 2006); *United States* v. *Davis*, 458 F.3d 491, 496 (6th Cir. 2006); *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005); *United States* v. *Kendall*, 446 F.3d 782, 785 (8th Cir. 2006), *cert. denied*, 127 S. Ct. 2973 (2007); *United States* v. *Bishop*, 469 F.3d 896, 907 (10th Cir. 2006); *United States* v. *McVay*, 447 F.3d 1348, 1357 (11th Cir. 2006). The circuits applying the test have offered varying formulations of this amorphous test and, indeed, have struggled not only to define the level of justification necessary to support a non-Guidelines sentence but even to develop a nomenclature by which to describe their conclusions. *See, e.g., United States* v. *Hildreth*, 485 F.3d 1120, 1127-28 (10th Cir. 2007) (distinguishing among an "extreme," "substantial," and "significant" variances, which must respectively be supported by "extraordinary," "dramatic," and "sufficient" justifications); *United States* v. *Wallace*, 458 F.3d 606, 614 (7th Cir. 2006) (stating that a "World Series" variance requires a "World Series" justification); *cf.* Transcript of Oral Argument at 43, *United States* v. *Claiborne*, 127 S. Ct. 2245 (2007) (No. 06-5618) (noting that the "extraordinary circumstance" test "sounds like a slogan") (Breyer, J.). But, no matter the name applied, the test retains the same basic framework in each circuit in which it is applied: it

United States v. *Davis*, 458 F.3d 491, 496 (6th Cir. 2006). On review, the court of appeals will assume that sentences outside the Guidelines are unreasonable in the absence of such affirmative evidence to the contrary. See *id.*; *United States* v. *Myers*, 439 F.3d 415, 417-18 (8th Cir. 2006); *United States* v. *Moreland*, 437 F.3d 424, 433 (4th Cir.), *cert. denied*, 126 S. Ct. 2054 (2006). This is the very definition of a "presumption." See, *e.g.*, *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 49-50 n.3 (2003), *cited in Rita*, 127 S. Ct. at 2463 ("[A] trial-related evidentiary presumption . . . insist[s] that one side, or the other, shoulder a particular burden of persuasion or proof lest they lose their case."). While the Government and the courts of appeals have attempted to characterize the test otherwise – precisely because they understand the problems inherent in such a presumption[3] – they cannot disguise the test's fundamental operation in requiring a greater quantum and quality of evidence to support a sentence outside the Guidelines range than that necessary for one within it.

A presumption of unreasonableness conflicts fatally with this Court's interpretation of the Sixth Amendment and the

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requires *any* non-Guidelines sentence to be supported by supplemental findings of the sentencing court. *See, e.g.*, *Davis*, 458 F.3d at 496 ("[T]he farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification based on factors in section 3553(a) must be.") (quoting *Dean*, 414 F.3d at 729); *see also United States* v. *Rattoballi*, 452 F.3d 127, 134 (2d Cir. 2006) (stating that circuits applying the test hold that "district courts [must] offer a more compelling accounting the farther a sentence deviates from the advisory Guidelines range").

[3] *E.g.*, *Moreland*, 437 F.3d at 433-34 (stating that the extraordinary circumstances test is not a presumption of unreasonableness); *United States* v. *Ferguson*, 456 F.3d 660, 664-65 (6th Cir. 2006) (same); *United States* v. *Howard*, 454 F.3d 700, 703 (7th Cir. 2006) (same); *Myers*, 439 F.3d at 417 (same); *United States* v. *Valtierra-Rojas*, 468 F.3d 1235, 1239 (10th Cir. 2006) (same), *cert. denied*, 127 S. Ct. 2935 (2007); see *Rita*, 127 S. Ct. at 2467.

Sentencing Reform Act. It forbids district courts from sentencing outside the Guidelines absent additional findings of fact, in violation of the Sixth Amendment; it impinges on the discretion granted to district courts under the Act; and it reconstructs the *de novo* standard of appellate review that this Court excised in *Booker*. The presumption of unreasonableness, and the extraordinary circumstances test from which it arises, must be rejected.

A. The Extraordinary Circumstances Test Violates The Constitutional Right To A Jury Trial Under The Sixth Amendment.

The Sixth Amendment guarantees that a defendant will suffer no greater punishment upon conviction than that which is authorized under governing law based solely on the facts found by a jury or admitted in a plea. *Cunningham* v. *California*, 127 S. Ct. 856, 860 (2007). A court is therefore constitutionally prohibited from imposing a sentence above that authorized exclusively by the verdict or plea. *Id.*; *Blakely* v. *Washington*, 542 U.S. 296, 303-04 (2004); *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000).

The Court has applied this standard to invalidate sentencing schemes that forbid the trial judge from imposing sentence outside a particular range in the absence of additional findings beyond those reflected in the verdict. In *Blakely*, state law established a sentencing range based upon facts reflected in the guilty verdict or plea and then allowed the judge to sentence above that range only if he or she made prescribed findings of fact or found other "substantial and compelling reasons" for doing so. 542 U.S. at 299-300. In *Booker*, the mandatory Guidelines prohibited the judge from imposing sentence above the "base" range, as determined by the facts found by the jury or admitted by the defendant, absent factual findings warranting an enhancement or departure. 543 U.S. at 226-27, 233-34. And, most recently in *Cunningham*, state law directed the judge to impose a presumptive "middle term" sentence, established by reference to the verdict or plea,

unless the judge found "circumstances in aggravation" or "circumstances in mitigation" warranting a sentence in the "upper term" or the "lower term." 127 S. Ct. at 862-68. All of these systems were deemed unconstitutional because they established a sentencing range based on the facts reflected in the verdict or plea and then forbade the trial judge from imposing a sentence above that range in the absence of additional, judge-made findings of fact. See *Rita*, 127 S. Ct. at 2466 ("The Sixth Amendment question, the Court has said, is whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede).") (emphasis in original).

The extraordinary circumstances test gives rise to a sentencing system materially indistinguishable from those at issue in *Blakely*, *Booker*, and *Cunningham*. Under the test, the only manner in which the sentencing court can impose a sentence above the base Guidelines range (determined by the facts reflected in the verdict or plea) is (i) by making additional findings that enhance the range under the Guidelines or (ii) by making findings that justify a variance under § 3553(a). See, *e.g.*, 446 F.3d at 889 (J.A. 136-37). In either case, the findings increase the maximum punishment to which the defendant is exposed; yet, they are made by the judge, not the jury. This violates the "bright-line rule" of *Apprendi*: "[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

Indeed, the test imposes a double factfinding requirement in many cases. Initially, sentencing courts must often find facts beyond those reflected in the jury's verdict or the defendant's plea to establish the Guidelines sentence.[4] These findings, if

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[4] Although "over 95% of all federal criminal prosecutions are terminated by a plea bargain[] and . . . in almost half of the cases that go to trial there are no sentencing enhancements," *Booker*, 543 U.S. at 273-74

they increase the permissible sentence above the base range established by the verdict or plea, constitute a violation of the Sixth Amendment. See *Booker*, 543 U.S. at 234-36. Then, if the sentence to be imposed is above the Guidelines range, the test requires the court to find and articulate *additional* facts in support thereof. This second level of factfinding serves to increase the permissible sentence even farther above the base range and likewise constitutes a violation of the Sixth Amendment. See, *e.g.*, *Blakely*, 542 U.S. at 299-300. In this regard, the test exacerbates the extra-verdict factfinding that engenders Sixth Amendment questions in the first instance.

The fact that Mr. Gall's sentence is lower than the recommended Guidelines range does not diminish the import of the constitutional questions engendered by an extraordinary circumstances test. The extraordinary circumstances test is structural and systemic: it affects all sentences outside the Guidelines in the jurisdictions in which it has been adopted. See, *e.g.*, *United States* v. *McMannus*, 436 F.3d 871, 874 (8th Cir. 2006). In this respect (and as explained further *infra*), the test cabins the constitutionally mandated discretion of the sentencing court to treat the Guidelines as wholly advisory. See *Rita*, 127 S. Ct. at 2463-67; *Booker*, 543 U.S. at 246. It requires the sentencing court to give the Guidelines range "special weight" by necessitating significant additional findings, and significant additional work, to justify any "deviation."

It is no answer to suggest that the Court could ameliorate constitutional concerns by holding that the test shall apply only to sentences lower than the base Guidelines range. First, such a holding (even if it could be somehow justified under the language and history of the statute, see *infra*) would raise

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(Stevens, J., dissenting in part), it remains the case that many plea agreements – like the one executed by Mr. Gall, *see* Plea Agr. (J.A. 12) – do not address all (or, sometimes, any) of the outstanding factual disputes material to sentencing, requiring the district judge to resolve those issues during subsequent proceedings. *See* Fed. R. Crim. P. 32(f), (g), (i).

the significant risk of restoring the Guidelines range to a *de facto* mandatory status by emphasizing their "special weight" at the district court level. See *Rita*, 127 S. Ct. at 2465-67 (stating that a rule presumptively requiring the district court to sentence within the Guidelines range would raise constitutional concerns). Second, this Court expressly rejected the imposition of such a "one-way ratchet" as a permissible outcome in *Booker*. 543 U.S. at 266 ("[W]e do not see how it is possible to [treat the Guidelines as advisory in some cases but] leave the[m] as binding in other cases. . . . We do not believe that such 'one-way lever[s]' are compatible with Congress' intent.") (internal citation omitted); see *Rita*, 127 S. Ct. at 2477 n.2 (Scalia, J., concurring in the judgment) ("[S]ince reasonableness review should not function as a one-way ratchet, we must forswear the notion that sentences can be too low in light of the need to abandon the concept that sentences can be too high."). Finally, the very fact that the extraordinary circumstances test would violate constitutional protections in a number of cases, even if it does not do so here, justifies consideration of the issue in this case. See *Clark* v. *Martinez*, 543 U.S. 371, 380-81 (2005) ("If one of [two plausible statutory constructions] would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court.").

It is also no answer to characterize the extraordinary circumstances test as merely a requirement that district courts fully articulate the reasons for non-Guidelines sentences. See Brief of Respondent at 34, *United States* v. *Claiborne*, 127 S. Ct. 2245 (2007) (No. 06-5618) ("Resp. *Claiborne* Brief"). While courts of appeals may properly demand articulation of the specific reasons for sentences outside the Guidelines (just as they must demand an articulation of reasons even for sentences inside the Guidelines range), see § 3553(c), the extraordinary circumstances test goes farther. It requires that the sentencing court offer not only more explanation, but

additional findings of fact to support a sentence outside the Guidelines and *further* requires that those facts meet the qualitative test of being unusual to the point of being "extraordinary" or "compelling." See, *e.g.*, *United States* v. *Maloney*, 466 F.3d 663, 668 (8th Cir. 2006) (requiring "exceptional facts"); *Davis*, 458 F.3d at 500 (requiring "extraordinary facts"). Thus, the sentencing court cannot satisfy the quantitative or qualitative nature of the test merely by saying or writing more. See *Moreland*, 437 F.3d at 436 (character-izing district court's recitation of reasons as "exemplary" but overturning judgment as unreasonable); see also, *e.g.*, *United States* v. *Mateo*, 471 F.3d 1162, 1170 (10th Cir. 2006) (requiring "dramatic facts"), *cert. denied*, 127 S. Ct. 2890 (2007); *United States* v. *Smith*, 440 F.3d 704, 707 (5th Cir. 2006) (stating that justification should be "fact-specific").[5] Indeed, the Government itself has characterized the test as requiring the sentencing court to identify "facts" in support of a sentence outside the Guidelines. Resp. *Claiborne* Brief at 36. No reported decision has upheld a non-Guidelines sentence under the extraordinary circumstances test based solely on the facts found by the jury.[6]

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[5] Moreover, courts have frequently held that a district court may not vary from the Guidelines based solely on policy disagreements with the Commission or Congress. *E.g.*, *United States* v. *Gentile*, 473 F.3d 888, 892-93 (8th Cir. 2007); *see also United States* v. *Spears*, 469 F.3d 1166, 1174-75 (8th Cir. 2006) (en banc) (citing cases); *United States* v. *Williams*, 472 F.3d 835, 838-39 (11th Cir. 2006) (Murphy, J., concurring) (same); *Mateo*, 471 F.3d at 1171 (same); *United States* v. *Pho*, 433 F.3d 53, 64-65 (1st Cir. 2006) (same). The Court will address the issue of whether a district court may consider policy disagreements regarding the crack-powder ratio in crafting a sentence in *United States* v. *Kimbrough*, No. 06-6330 (U.S. cert. granted June 11, 2007).

[6] Several courts have gone so far as to suggest that a factor will be deemed "extraordinary" – so as to justify a variance from the recommend range – only if it is not adequately taken into consideration in the Guidelines. *See United States* v. *Borho*, 485 F.3d 904, 912-16 (6th Cir. 2007) (criticizing reliance upon medical and mental conditions as grounds for a non-Guidelines sentence as those factors are discouraged under the

Further, most criminal verdicts are general in nature, stating only whether the defendant is guilty or not. Even special verdicts normally include only those factual inquiries necessary to establish the minimum elements of the charged offense and statutory sentencing enhancements. See, *e.g.*, *United States* v. *Hedgepeth*, 434 F.3d 609, 613-14 (3d Cir.), *cert. denied*, 126 S. Ct. 2055 (2006); *United States* v. *Nelson-Rodriguez*, 319 F.3d 12, 46-47 (1st Cir. 2003). The verdict generally says nothing about the particular offender or the particular offense or whether the defendant's circumstances differ from those of other defendants convicted of similar crimes. And verdicts do not, except in capital cases, require juries to find facts in mitigation. The only means by which a judge can determine that a case is somehow different from the run of the mine – i.e., "extraordinary" – is through additional findings of fact. Most often this is done by adopting the presentence investigation report, the allegations of which may suffer from evidentiary flaws not subject to traditional adversarial challenge. See, *e.g.*, *Booker*, 543 U.S. at 304 (Scalia, J., dissenting in part) (criticizing the practice of "*judges* determin[ing] 'real conduct' on the basis of bureaucratically prepared, hearsay-riddled presentence reports" as opposed to "adher[ing] to the old-fashioned process of having *juries* find the facts that expose a defendant to increased prison time") (emphasis in original).

Respondent has suggested that the range of factors upon which a non-Guidelines sentence may be based are broader than those upon which a traditional Guidelines departure could be granted. See Resp. *Claiborne* Brief at 39. This proposition, even if true, is irrelevant. The Sixth Amendment

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Guidelines); *United States* v. *Likens*, 464 F.3d 823, 826 (8th Cir. 2006) (concluding that issues such as age and drug addiction – because they are labeled as discouraged factors under the Guidelines – are "not ordinarily extraordinary circumstances" and cannot support a variance); *United States* v. *Ture*, 450 F.3d 352, 359 (8th Cir. 2006) (because the factors identified by the district court "weighed heavily in [calculating the] Guidelines range," those factors did not support the variance).

problem arises not because limitations are placed on the judge's discretion to choose among the facts sufficient to justify an increased sentence, but because the judge is obliged to make additional findings to authorize the sentence in the first place. See *Blakely*, 542 U.S. at 305 ("Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact, one of several specified facts, or *any* aggravating fact, it remains the case that the jury's verdict alone does not authorize the sentence.") (internal parentheticals omitted), *quoted in Cunningham*, 127 S. Ct. at 865.

Respondent has also attempted to salvage the test by stating that it applies only to "significant" variances. See Resp. *Claiborne* Brief at 38. This is incorrect as a matter of law. The courts of appeals that have adopted the test most often apply it *whenever* the sentence falls outside the Guidelines. See, *e.g.*, *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005) ("[T]he farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification based on factors in section 3553(a) [must be]."); see *supra* note 3. More importantly, it is wholly immaterial to the constitutional inquiry. Whether the court of appeals applies the test to all sentences outside the Guidelines or only to those that are somehow determined to be "significantly" outside the recommended, the result is the same: the court of appeals has imposed an additional factfinding requirement and a limitation on the discretion of the district court to impose a sentence above or below a certain range. See *Rita*, 127 S. Ct. at 2466.

The extraordinary circumstances test establishes a presumption of unreasonableness in violation of the Sixth Amendment. See *id.* at 2467; see also *Booker*, 543 U.S. at 311 (Scalia, J., dissenting in part) ("[A]ny system which held it per se unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional."). The cure for the constitutional problem

lies in the invalidation of the extraordinary circumstances test in all of its forms. This will render the Guidelines "genuinely" advisory and give district courts the discretion to sentence within the statutory range based on a rational assessment of the relevant factors. *Cunningham*, 127 S. Ct. at 871. Such an approach would "encounter no Sixth Amendment shoal." *Id.*

B. The Extraordinary Circumstances Test Contravenes The Sentencing Reform Act.

The Sentencing Reform Act is unambiguous. It directs the *sentencing judge* to "consider" the factors and purposes relevant to punishment and to "impose" the sentence that is "sufficient but not greater than necessary" to satisfy those purposes. *Rita*, 127 S. Ct. at 2467 (quoting § 3553(a)). The statute contains no hierarchy of factors and does not mandate that a district court give greater or controlling weight to the Guidelines or other considerations. *Booker*, 543 U.S. at 304-05 (Scalia, J., dissenting in part) ("The statute provides no order of priority among all th[e] factors."). To the contrary, as this Court recognized in *Rita*, the modified statute contemplates – indeed, requires – that district courts have the discretion to give the relevant factors and purposes the weight they rationally deem appropriate in light of the circumstances of the case. § 3553(a); see *Rita*, 127 S. Ct. at 2465.

To be sure, the discretion granted to sentencing courts is not unbounded. Pursuant to the Court's opinion in *Booker*, sentencing courts will look to Congress's articulation of the sentencing purposes and factors set forth in § 3553(a) and must give reasons for the sentence imposed, as required by § 3553(c), whether that sentence is inside or outside the Guidelines range. *Booker*, 543 U.S. at 259-61; see *Rita*, 127 S. Ct. at 2463-69. The sentencing court must also honor Congress's plain directive to impose the sentence that is "sufficient but not greater than necessary" to achieve the purposes of sentencing. *Id.* at 2463 (quoting § 3553(a)). But it is the sentencing judge, and the sentencing judge alone,

who holds the authority to weigh the principles and factors relevant to punishment and, based upon a rational assessment of those considerations, to determine the appropriate sentence in each individual case. *Id.*

The extraordinary circumstances test abrogates this statutory discretion. By mandating that a district court impose sentence within the Guidelines range absent "extraordinary circumstances," the test effectively forces the district court to give greater weight to a single factor – the range recommended by the Guidelines – than to all of the other factors and purposes listed in § 3553(a). The sentencing court cannot disagree with the Guidelines or decide that the policies on which they are based do not deserve weight in a particular case. See, *e.g.*, *United States* v. *Gentile*, 473 F.3d 888, 892-93 (8th Cir. 2007); *United States* v. *Williams*, 472 F.3d 835, 838-39 (11th Cir. 2006); *Mateo*, 471 F.3d at 1171; *United States* v. *Pho*, 433 F.3d 53, 64-65 (1st Cir. 2006). Rather, it is compelled under the test to accord the Guidelines controlling authority unless other facts provide affirmative and "extraordinary" justifications for imposing a sentence different than the recommended range. See, *e.g.*, *United States* v. *Borho*, 485 F.3d 904, 912-16 (6th Cir. 2007); see also 446 F.3d at 889 (J.A. 136-37).

The test is also inconsistent with Congress's overarching command that the District Court must impose the sentence that is "sufficient but not greater than necessary." § 3553(a). This command is neither superfluous statutory language nor a simple mandate for leniency. It carries strong historical and moral underpinnings and prohibits punishment that serves no distinct purpose or may otherwise be deemed gratuitous in light of the characteristics of the defendant and the nature of the crime. Brief of Families Against Mandatory Minimums as Amicus Curiae Supporting Petitioner at 5-12, *Rita*, 127 S. Ct. 2456 (No. 06-5754) ("FAMM Brief"). Yet, under the test, the sentencing court is barred from determining that a sentence outside the Guidelines would serve the purposes of

punishment in a particular case, unless the facts of the case can be deemed somehow "extraordinary." See, *e.g.*, *Borho*, 485 F.3d at 912-16; see also 446 F.3d at 889 (J.A. 136-37). This showing will necessarily be difficult to make in the majority of "ordinary" cases – especially in light of restrictive circuit court precedent on the issue. See, *e.g.*, *United States* v. *Howard*, 454 F.3d 700, 703 (7th Cir. 2006); *United States* v. *Matheny*, 450 F.3d 633, 642 (6th Cir. 2006); *Myers*, 439 F.3d at 417; *Moreland*, 437 F.3d at 433. District courts will therefore regularly be forced to impose a Guidelines sentence despite their determination that a lesser (or greater) one would be "sufficient but not greater than necessary" to meet the purposes of § 3553(a).

This Court recognized in *Booker* and *Rita* that, under the revised version of the Act, the range recommended by the Guidelines is merely "advisory." *Rita*, 127 S. Ct. at 2467; *Booker*, 543 U.S. at 246. While the sentencing court must "consider" and "consult" the Guidelines, *Booker*, 543 U.S. at 246, the judge must then be free to determine, based upon a rational assessment of the § 3553(a) factors, that a different sentence is "sufficient but not greater than necessary" to satisfy the purposes of punishment. *Rita*, 127 S. Ct. at 2462-65.

A sentencing court operating under the burden of the extraordinary circumstances test simply cannot make a reasoned decision based upon its assessment of the statutory factors, principles, and purposes. Instead, a court contemplating a sentence different from the Guidelines range must engage in a further exercise of finding, specifying, and articulating – with increasing levels of emphasis (depending on some undefined measure of distance from the Guidelines calcu-lation) – additional facts to justify its decision. *E.g.*, *United States* v. *Hildreth*, 485 F.3d 1120 (10th Cir. 2007). Heaven help the judge who, despite a careful articulation of reasons, does not discuss every single one of the statutory factors under § 3553(a) *and* make supplemental findings of

fact that can be characterized as "extraordinary." Such incompleteness is grounds for reversal, see 446 F.3d at 889 (J.A. 137), despite the fact there is no such requirement for judges who impose sentence within the Guidelines. Such a double-standard for imposing sentence is expressly rejected by *Rita*, see 127 S. Ct. at 2465 ("[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."), and is wholly inconsistent with *Booker*, see 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must *consult* those Guidelines and take them into account when sentencing.") (emphasis added).

C. The Extraordinary Circumstances Test Is Inconsistent With The "Reasonableness" Standard Of Appellate Review Adopted In *Booker*.

The extraordinary circumstances test turns a constitutionally balanced sentencing regime on its head. In its current guise, it functions (as before *Booker*) to permit a court of appeals to overturn a judgment of sentence solely because the appellate court would have imposed a different sentence than the district court. Under the test, appellate courts need not give deference to the district court's determination that a non-Guidelines sentence is appropriate. Rather, they may exercise essentially *de novo* review over sentences to determine whether, in their view, the magnitude of the variance is justified by "extraordinary circumstances." See, *e.g.*, *Moreland*, 437 F.3d at 433-34.

In *Booker*, this Court excised from the Sentencing Reform Act the provision that directed courts of appeals to exercise *de novo* review over non-Guidelines sentences to determine whether they "depart to an unreasonable degree from the applicable guidelines range." 543 U.S. at 259-61 (citing 18 U.S.C. § 3742(e)). In place of this provision, the Court held that courts of appeals should review sentences "across the board" to determine whether they are "reasonable" in light of all of the factors and purposes of § 3553(a). *Id.* This form of

review, based on the pre-2003 version of the statute, was intended to be highly deferential. See *id.* This standard, properly construed, contemplates that a judgment will be overturned on appeal as "unreasonable" only if the district court abused its discretion by failing to comply with the statute or by imposing a sentence that no rational judge in the same position could have potentially imposed. See *Rita*, 127 S. Ct. at 2465 (noting "our explanation in *Booker* that appellate 'reasonableness' review merely asks whether the trial court abused its discretion"); *id.* at 2470-71 (Stevens, J., concurring) ("*Booker* replaced the *de novo* standard of review required by 18 U.S.C. § 3742(e) with an abuse-of-discretion standard that we called 'reasonableness' review.") (internal citation omitted); cf. *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (in reviewing a finding to determine whether it is "reasonable," an appellate court should affirm even when it would have reached a different result so long as a rational jurist could have potentially reached the challenged result).

This standard is consonant with the principle, previously recognized by this Court, that "[d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations." *Koon* v. *United States*, 518 U.S. 81, 98 (1996) (stating that district courts must have the flexibility to resolve questions "involving multifarious, fleeting, special, narrow facts that utterly resist generalization") (internal quotes omitted). Only district courts have direct exposure to the defendant and the opportunity to assess the evidence and testimony as it is presented, in the context of the entire case. See *United States* v. *Stevenson*, 396 F.3d 538, 543 (4th Cir.) ("[B]ecause trial courts conduct the factfinding process repeatedly and routinely, they develop a facility – indeed an *expertise* – to which appellate courts should find it wise to

defer."), *cert. denied*, 544 U.S. 1067 (2005).[7] There is inherent tension among the statutorily enumerated purposes of punishment, see *Rita*, 127 S. Ct. at 2464 (noting that "the goals of *uniformity* and *proportionality* often conflict") (emphasis in original), and there is no single "right" sentence that a court of appeals should dictate in a given case, see *Koon*, 518 U.S. at 98. Rather, reconciliation of the conflicting statutory purposes and choice of the final sentence are properly left to the sentencing judge, with the court of appeals refereeing the proceedings to ensure that the judgment is not out of rational bounds. *Rita*, 127 S. Ct. at 2464 ("[D]ifferent judges (and others) can differ as to how best to reconcile the disparate ends of punishment.").

The cases cited by the Court in *Booker* as exemplifying reasonableness review bear this out. These decisions do not require exceptional circumstances to justify variances from the Guidelines range. See *United States* v. *White Face*, 383 F.3d 733, 739 (8th Cir. 2004); *United States* v. *Hurst*, 78 F.3d 482 (10th Cir. 1996); see also *United States* v. *Tsosie*, 376 F.3d 1210, 1218 (10th Cir. 2004), *cert. denied*, 543 U.S. 1155 (2005); *United States* v. *Kelley*, 359 F.3d 1302, 1304-05 (10th Cir. 2004); *United States* v. *Cook*, 291 F.3d 1297, 1302 (11th Cir. 2002); *United States* v. *Wall*, No. 99-1626, 2000 WL 280322, at *3-4 (2d Cir. Mar. 14, 2000); *United States* v. *Marvin*, 135 F.3d 1129, 1136 (7th Cir. 1998). Rather, they recognize that the advisory range, while entitled to consideration, should "inform[] rather than cabin[] the exercise of the judge's discretion." *United States* v. *Salinas*, 365 F.3d 582, 588-90 (7th Cir. 2004). Just as reasonableness review in the revocation context is not tethered to the advisory range, so must reasonableness review post-*Booker*

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[7] *See also Likens*, 464 F.3d at 827 n.1 (Bright, J., dissenting) ("In his tenure as a federal district judge, Judge Pratt [the sentencing judge here] has sentenced approximately nine hundred ninety offenders ... all of whom he has looked in the eye when imposing a sentence.").

remain unchained to the Guidelines. Brief of Petitioner at 26, *Rita*, 127 S. Ct. 2456 (No. 06-5754).

The standard applied under the extraordinary circumstances test is materially indistinguishable from the standard applied under the provision of § 3742(e) excised in *Booker*. That provision required appellate courts to review *de novo* a non-Guidelines sentence to determine whether it "depart[s] to an unreasonable degree from the applicable guidelines range." § 3742(e). The extraordinary circumstances test is merely a surrogate for this excised standard, giving definition to those sentences that "depart to an unreasonable degree" – that is, those which are not accompanied by additional, peculiar circumstances that rise to the level of extraordinary or compelling. See, *e.g.*, *Moreland*, 437 F.3d at 433. This is an express invitation to courts of appeals to impose their own judgment in the matter, as opposed to deciding (as they should) only whether the district court's sentence was reasonable under the facts at hand. See *Rita*, 127 S. Ct. at 2483 n.7 (Scalia, J., concurring in the judgment) ("Courts have no power to add provisions that might be desirable now that certain provisions have been excised.").

The most vivid illustrations of the type of *de novo* review exercised by courts of appeals under the extraordinary circumstances test are found in numerous opinions where the courts of appeals have instructed district courts that they *must* sentence within a particular range on remand. *United States* v. *Rajwani*, 476 F.3d 243, 253 (5th Cir.) (no more than 92 months' imprisonment), *amended on other grounds*, 479 F.3d 904 (5th Cir. 2007); *United States* v. *Thurston*, 456 F.3d 211, 220 (1st Cir. 2006) (no less than 36 months' imprisonment); *Moreland*, 437 F.3d at 437 (no less than 20 years' imprisonment); see also *United States* v. *Ture*, 450 F.3d 352, 359 (8th Cir. 2006) (requiring district court to impose sentence of imprisonment on remand). That these courts have taken this step – deciding for themselves the permissible range of sentences – exposes the pernicious effect of the

extraordinary circumstances test. In this fashion, the test entirely supplants the deference to the district court's exercise of judgment that the Court found critical in *Booker* and *Rita*. See *Rita*, 127 S. Ct. at 2463-66; *Booker*, 543 U.S. at 260-61. The test endorses the mistaken view that courts of appeals are empowered to engage in *de novo* review of the facts of the case and to decide for themselves what the appropriate sentence should be.

Nor does the extraordinary circumstances test find support in the prior decisions of this Court cited in *Booker*: *Pierce* v. *Underwood*, 487 U.S. 552 (1988), *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990), and *Koon*. These cases emphasize that, under abuse-of-discretion review, the district court must be granted deference to assess the evidence and render judgment based on the individual circumstances of the case. *E.g.*, *Koon*, 518 U.S. at 99. Nothing in these decisions suggests that the court of appeals should weigh the pertinent factors itself or may direct the district court to give greater or lesser weight to one of the relevant considerations. As the Court remarked in *Koon*: "[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." *Id.* at 97 (quoting *Williams* v. *United States*, 503 U.S. 193, 205 (1992)).

The extraordinary circumstances test cannot legally coexist with the presumption of reasonableness recently upheld in *Rita*. The presumption of reasonableness, as this Court noted, is a purely appellate standard. *Id.* at 2462-68. It imposes no limitation on the district court and interferes in no way with the sentencing judge's authority under § 3553(a) to impose a sentence within or without the range recommended by the Guidelines. *Id.* It merely acknowledges that, when the sentencing judge has weighed all of the relevant factors and has nevertheless determined in the exercise of his or her discretion that a sentence within the Guidelines range is appropriate, the court of appeals may generally assume that

the sentence represents a "reasonable" exercise of that discretion. *Id.*

In *Rita*, the Court emphasized that one basis for such confidence in the result lies in the confluence of the district court's judgment with that of the Commission. *Id.* The validity of this rationale, however, turns on whether the district court has independently exercised its judgment. See *id.* at 2465 ("In determining the merits of these arguments, the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."). The extraordinary circumstances test encroaches on this judgment by mandating that the district court give presumptive weight to one factor: the range recommended by the Guidelines. It does not merely "encourage" district courts to sentence within the Guidelines: it compels them to do so in the absence of special circumstances.

There is no basis to presume a non-Guidelines sentence unreasonable. A judge who imposes a sentence outside the Guidelines thereby indicates that he or she has declined to adopt the findings and recommendations of the Sentencing Commission as inconsistent with the needs of the case at bar. See *id.* at 2464-65. In such a case, unlike when the judge imposes sentence within the Guidelines, there is no alignment of the "judge's discretionary decision [and] the Commission's view of the appropriate application of § 3553(a)" and no reason for an appellate court to assume that the range recommended by the Guidelines represents the "sufficient but not greater than necessary" sentence. *Id.* at 2463-65 (internal citation omitted). To the contrary, to presume the Guidelines range to be "correct" would improperly grant greater deference to the Commission than to the sentencing judge, who is tasked under the Sentencing Reform Act with crafting the final sentence in an individual case. *Id.* In other words, the test improperly "grant[s] greater factfinding leeway to an expert agency than to a district judge." *Id.*

"That the district court retains much of its traditional discretion does not mean appellate review is an empty exercise." *Koon*, 518 U.S. at 98. Courts of appeals are still empowered to correct legal error by the district courts and to ensure that those courts follow the statutory mandate to consider all relevant factors and determine the sentence that is "sufficient but not greater then necessary." See *Rita*, 127 S. Ct. at 2462-65. An appellate panel may assess the reasons given by the district court to assure that they are not irrational or irrelevant – such as, for instance, a policy that Yankees fans should receive lighter sentences than Red Sox fans, see *id.* at 2473 (Stevens, J., concurring); *id.* at 2482-83 & n.6 (Scalia, J., concurring in the judgment) – and may overturn judgments that are so plainly excessive (or unjustifiably lenient) that a rational judge in the same position could not have imposed the same sentence. See *id.* at 2462-65.

Rejection of the extraordinary circumstances test is thus perfectly in accord with this Court's observation that, even after *Booker*, "appellate review[] . . . would tend to iron out sentencing differences." 543 U.S. at 263. There is no need, nor any statutory basis, to engraft onto the system a presumption of unreasonableness in order to compel compliance with the Guidelines or promote uniformity.[8]

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[8] Whether the Guidelines themselves are effective in promoting uniformity is open to debate. Mandatory application of the Guidelines has been shown to exacerbate, not reduce, disparities among sentences in the federal system. Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan. L. Rev. 85 (2005); Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, 10 Fed. Sent'g Rep. 16 (1997). The Sentencing Commission itself has acknowledged that the relevant conduct rules give rise to "significant sentencing disparit[ies]" and that "questions remain about how consistently [they] can be applied." U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 27, 50 (2004).

The legislative history of the Sentencing Reform Act confirms that Congress expected that sentencing judges would exercise discretion in individual cases to choose the appropriate sentence for the defendant, whether or not that sentence falls outside the Guidelines range. See S. Rep. No. 98-225, at 52 (1983) ("[T]he sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the Guidelines in an appropriate case."); *id.* at 150 ("The sentencing provisions of the reported bill are designed to preserve the concept that the discretion of the sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court."). To the extent that disparities may sometimes result from full and reasoned application of § 3553(a), these disparities are not "unwarranted" at all. Rather, they reflect the proper and intended functioning of the Act, which gives discretion to the sentencing judge to decide upon the appropriate sentence. *Rita*, 127 S. Ct. at 2463. Affirmance of such sentences, even though they lie outside the Guidelines range, is thus fully consistent with congressional intent and the statutory language, which is more than can be said for the extraordinary circumstances test.

II. THE DISTRICT COURT'S CHOICE OF A BELOW-GUIDELINES SENTENCE IN THIS CASE WAS REASONABLE.

Here, the District Court considered the relevant factors under § 3553(a), imposed the sentence that it determined was "sufficient but not greater than necessary" to satisfy the relevant purposes, and offered a thorough explanation for its decision. The Eighth Circuit failed to give deference to the District Court's determination and, instead, reversed the sentence on the ground that the facts identified by the District Court were not "extraordinary." This standard should not have been applied and, in any event, should have led the court of appeals to affirm the sentence.

A. The District Court Considered All Relevant Factors And Imposed The Sentence That Was "Sufficient But Not Greater Than Necessary" To Comply With The Purposes Of Sentencing.

The District Court in this case imposed a sentence rationally grounded in the § 3553(a) factors and consistent with the statute's command to impose the sentence that is "sufficient but not greater than necessary" to meet the purposes of punishment. One need look no further than the careful sentencing memorandum prepared by the District Court as confirmation. In the introductory section of that memorandum, the District Court recognized that, "[i]n fashioning a sentence that is 'sufficient, but not greater than necessary,'" it must consider all factors and purposes of § 3553(a), which it then listed individually. 374 F. Supp. 2d at 759-60 (J.A. 118-19). There is no doubt that the District Court appreciated its duties under the statute.

In compliance with those duties, the District Court started with an assessment of the range and policies recommended under the Guidelines. See § 3553(a)(4), (5). It adopted the findings of the presentence report and concluded that the recommended range of imprisonment was 30 to 37 months. 374 F. Supp. 2d at 760 (J.A. 119-20). It then denied Mr. Gall's motions for a downward departure under the Guidelines – based upon his age, his cooperation, his acceptance of responsibility, his remorse, his post-offense rehabilitation, his voluntary withdrawal, and the "aberrant" nature of the offense – while noting that these factors could be "better discussed" and "more aptly considered" under § 3553(a). *Id.* at 760-61 (J.A. 120-22).

As to the "nature and circumstances of the offense" and Mr. Gall's "history and characteristics," § 3553(a)(1), the District Court found that Mr. Gall's conduct did not involve violence or firearms and "appears to stem from his addictions to drugs and alcohol." 374 F. Supp. 2d at 761-62 (J.A. 122). Mr. Gall was using ecstasy and other drugs regularly when he

met Mr. Rinderknecht, and there is little doubt that his addictions induced him to participate in the distribution conspiracy. See Sent'g Tr. at 53 (J.A. 101-02). The District Court also indicated that Mr. Gall's offense could be attributed in part to his immaturity, noting that "all of [Mr. Gall's] criminal conduct, including the present offense, occurred when he was twenty-one-years old or younger." 374 F. Supp. 2d at 761-62 (J.A. 123). Notably, neither of these factors – substance abuse and youth – are relevant facts under the Guidelines. Guidelines § 5H1.1 ("Age (including youth) is not ordinarily relevant in determining whether a departure is warranted."); *id.* § 5H1.4 ("Drug or alcohol dependence or abuse is not a reason for a downward departure.").

Perhaps most important to the District Court's decision was another fact that the Guidelines substantially discount: Mr. Gall's acceptance of responsibility and post-offense rehabilitation. See 374 F. Supp. 2d at 762-64 (J.A. 122-26); cf. Guidelines § 5K2.0(d)(2) (prohibiting departure based on "defendant's acceptance of responsibility for the offense"). Mr. Gall voluntarily withdrew from the conspiracy in September 2000,[9] and when later approached by law enforcement agents – nearly *three years* after the events at issue – he forthrightly admitted to his involvement in the crime. Cf. *id.* § 5K2.16 (stating that voluntary disclosure is

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[9] Mr. Gall's voluntary withdrawal from the conspiracy may be even more significant in light of the fact that he had obtained $30,000 to $40,000 from the scheme. These profits were, as characterized in the presentence report, "easy money," PSR at 14 (Sealed J.A. 159), and must have been highly tempting for someone in Mr. Gall's position, "from a working-class family [with] few financial resources," 374 F. Supp. 2d at 762 n.3 (J.A. 124). *Cf.* Guidelines § 5H1.12 ("[C]ircumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted."). That Mr. Gall, unlike his codefendants, nevertheless abandoned the venture reflects positively on his character, even if (as the District Court suggested, *see* 374 F. Supp. 2d at 762 n.3 (J.A. 123)) the retention of profits from criminal activity generally militates in favor of punishment.

not a ground for departure if it occurs as part of an investigation). Since the time of the offense, he has graduated from college, learned a trade, and built a successful business. Cf. *id.* § 5H1.11 ("[E]mployment-related contributions[] and similar prior good works are not ordinarily relevant in determining whether a departure is warranted."). He has remained sober and law-abiding during this period, becoming a productive member of the community. Cf. *id.* § 5H1.6 ("[C]ommunity ties are not ordinarily relevant in determining whether a sentence should be below the applicable guideline range."). The District Court correctly characterized his post-offense behavior as "exemplary," prompting a "small flood of letters from family, friends, and work colleagues attesting to [Mr. Gall's] character." 374 F. Supp. 2d at 762-64 (J.A. 124-26).

The District Court also addressed the "kinds of sentences available" and the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." See § 3553(a)(3), (6). It noted that the United States Code authorized a sentence of either probation or imprisonment for the offense of which Mr. Gall was convicted. 374 F. Supp. 2d at 762-64 (J.A. 124-25); see PSR 18-19 (Sealed J.A. 162-64). It also reiterated that the Guidelines generally call for a term of imprisonment of 30 to 37 months for similar offenses committed by defendants in the same criminal history category. 374 F. Supp. 2d at 762-64 (J.A. 124-26). Nevertheless, the District Court found that several considerations, primarily Mr. Gall's post-offense rehabilitation, set Mr. Gall apart from other defendants and warranted a disparate sentence in this case.

No circumstances weighed strongly in favor of imprisonment. That Mr. Gall had voluntarily withdrawn from the conspiracy, had terminated his own drug and alcohol abuse, and had become a productive member of society strongly suggested that he would "neither . . . return to criminal behavior nor [pose] a danger to society." *Id.* (J.A.

124-26). Indeed, the District Court found that a sentence of imprisonment would threaten Mr. Gall's progress and send a message that the law is "merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." *Id.* (J.A. 124-26). The sentence was therefore consonant with the "sufficient, but not greater than necessary" provision of § 3553(a), which strongly militates against incarceration without purpose or beneficial effect for the individual and society. See FAMM Brief at 5-12. Incarceration of individuals like Mr. Gall undoubtedly would discourage the very type of withdrawal and forthright admission that he evinced for the simple reason that such actions would only result in the same or similar punishment afforded to those who did not make such efforts. As the District Court recognized, this would promote "not respect, but derision, of the law." 374 F. Supp. 2d at 762-64 (J.A. 124-26).

A sentence of probation was wholly appropriate in this case. Probation has long been recognized as the best means by which society can impose punishment on an individual who poses little or no threat of recidivism and for whom imprisonment would be unjustified and counter-productive. *E.g.*, *United States* v. *Murray*, 275 U.S. 347, 357-58 (1928) ("Probation is the attempted saving of a man who has taken one wrong step, and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence."). Mr. Gall fits this description. Entirely of his own volition, he has since shown himself to be willing and able to conform with governing law and reintegrate into the community. Imprisonment would be not only unduly punitive but would in fact harm society's interests by removing a productive, law-abiding member from its ranks.

The decision not to incarcerate Mr. Gall does not remove the taint of Mr. Gall's conviction or its collateral consequences for his future. These consequences will be long-lasting for Mr. Gall, who was only 26 years old at the

time of sentencing. Mr. Gall will, moreover, be subject to strict limitations on his freedom of movement and conduct for the next three years. And, as the District Court noted, he would "always face[] harsh consequences . . . if he violates the conditions of his probationary term." 374 F. Supp. 2d at 762-64 (J.A. 124-26) ("[P]robation is not an act of leniency."). The District Court plainly acted within its discretion in finding that a sentence of probation for three years, with special conditions, satisfied the purposes set forth in § 3553(a)(2). See *United States* v. *Likens*, 464 F.3d 823, 827 (8th Cir. 2006) (Bright, J., dissenting) ("[T]hree years' probation . . . serve[s] to significantly curtail [the defendant's] mobility, activities, drug-use, and personal freedom while sparing the citizens of this country the expense of incarcerating a person in poor health who is no danger to society. Incarceration is not the only, and indeed not even always the best, means of punishing or deterring crime.").

The sentence was reversed by the Eighth Circuit not because it represented an abuse of discretion, but because it was not the same sentence that the court of appeals would have imposed. The Eighth Circuit's opinion asserts that the District Court "did not properly weigh" the seriousness of the offense, "placed too much emphasis" on Mr. Gall's post-offense rehabilitation, and should have given "significant weight" to the possibility of unwarranted sentencing disparities. 446 F.3d at 889-90 (J.A.138-39). These statements reflect a decided lack of deference to the District Court's reasoned judgment.

Most telling is the Eighth Circuit's bald assertion that "the record does not show that the district court considered whether a sentence of probation would result in unwarranted sentencing disparities." *Id.* at 890 (J.A. 139). This is simply incorrect. The District Court identified this factor explicitly in its sentencing memorandum as bearing on the appropriate sentence. 374 F. Supp. 2d at 760 (J.A. 119). It noted that the Guidelines recommended a range of imprisonment for the

offense at issue, and recognized that a sentence of probation was facially disparate from those imposed in other cases involving similar conduct. *Id.* at 764 (J.A. 126). Yet, citing statutory policy that "imprisonment is not an appropriate means of promoting correction and rehabilitation," § 3582(a), it found that the disparity was fully warranted by the particular circumstances of the case, including Mr. Gall's exceptional rehabilitation. 374 F. Supp. 2d at 762-64 (J.A. 122-27). The District Court thus did fully consider, and give appropriate weight to, the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." § 3553(a)(6).[10] There was thus no abuse of discretion in the District Court's judgment, and the sentence should have been affirmed as reasonable.

B. The District Court's Choice Of A Below-Guidelines Sentence Was Supported By Extraordinary Circumstances.

Even under *de novo* review of the type contemplated by the extraordinary circumstances test and applied by the Eighth Circuit, the court of appeals erred. Contrary to its conclusion, the facts of this case – particularly Mr. Gall's post-offense rehabilitation – constitute "extraordinary circumstances" that justify the sentence imposed by the District Court.

Post-offense rehabilitation is extraordinary if it is genuine, enduring, and undertaken independent of any threat of criminal sanctions. *E.g.*, *United States* v. *Craven*, 239 F.3d 91, 100 (1st Cir. 2001). Mr. Gall's rehabilitation is all of

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[10] The court of appeals mischaracterized the sentence of probation imposed on Mr. Gall as a "100% downward variance." 446 F.3d at 889 (J.A. 137). This is correct only when viewed from the inflexible standpoint that incarceration was compulsory here. It also presumes that the range recommended by the Guidelines is the benchmark by which the final sentence is to be determined, thereby improperly elevating the Guidelines over the other factors of § 3553(a).

these. His withdrawal from the conspiracy was voluntary and self-motivated (and occurred long before its discovery by authorities). Cf. *United States* v. *Pyles*, 482 F.3d 282, 285, 292 (4th Cir. 2007) (reversing non-Guidelines sentence when the defendant did not commence rehabilitation until after arrest); *United States* v. *Givens*, 443 F.3d 642, 645 (8th Cir. 2006) (same); *United States* v. *Medearis*, 451 F.3d 918, 921 (8th Cir. 2006) (same). He has since completed his university education, earned a reputation as a reliable and honest employee, remained sober, and led a law-abiding life. Cf. *Moreland*, 437 F.3d at 437 (reversing variance because of the defendant's "desultory pursuit of his education and his spotty employment history"); *United States* v. *Rogers*, 400 F.3d 640, 642 (8th Cir. 2005) (reversing variance when the defendant committed two parole violations), *cert. denied*, 126 S. Ct. 1020 (2006). These circumstances are demonstrably "extraordinary," and justify the non-Guidelines sentence in this case pursuant to these precedents. See *United States* v. *Clay*, 483 F.3d 739, 742 (11th Cir. 2007) (upholding variance when defendant commenced rehabilitation prior to arrest); *United States* v. *Newlon*, 212 F.3d 423, 424-25 (8th Cir. 2000) (upholding departure); *United States* v. *DeShon*, 183 F.3d 888, 889, 891 (8th Cir. 1999) (same); *United States* v. *Workman*, 80 F.3d 688, 701-02 (2d Cir. 1996) (same).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Appeals for the Eighth Circuit and remand with instructions to affirm the judgment of the District Court.

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ADDENDUM

STATUTORY ADDENDUM

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission

into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * * *

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[1] So in original. The period probably should be a semicolon.

(c) Statement of reasons for imposing a sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

* * * *

[3] So in original. The second comma probably should not appear.

18 U.S.C. § 3742. Review of a sentence

* * * *

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give

due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

* * * *

18 U.S.C. § 3582. Imposition of a sentence of imprisonment

(a) Factors to be considered in imposing a term of imprisonment.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

* * * *

No. 06-7949

IN THE

Supreme Court of the United States

BRIAN MICHAEL GALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF

The extraordinary circumstances test is a tale of promises that cannot be kept. Respondent assures that the test does not "inherently" establish an unlawful presumption of unreasonableness for sentences outside the range recommended by the United States Sentencing Guidelines. It declares that, consistent with the Constitution, the test does not require additional factfinding to justify non-Guidelines sentences. And it vouches that the test honors district court discretion and mandates appellate court deference.

The Eighth Circuit's decision, and respondent's own arguments, tell a different story. They confirm that the extraordinary circumstances test presumes all non-Guidelines sentences to be unreasonable unless the district court makes supplemental findings of fact and the court of appeals deems those facts sufficiently "extraordinary" to justify the sentence. This system violates the Sixth Amendment, the Sentencing Reform Act, and this Court's decisions in *Booker* and *Rita*.

Whether a sentence is "reasonable" must turn on *all* of the factors of 18 U.S.C. § 3553(a), and cannot be tethered exclusively to the Guidelines. By its own terms, respondent's version of the test measures the reasonableness of a sentence solely by the benchmark of the Guidelines. The Eighth Circuit relied on this flawed test in overturning the District Court's reasoned judgment that the defendant, who had voluntarily withdrawn from criminal conduct and rehabilitated himself, deserved a lesser punishment than that prescribed in the Guidelines. That decision must be reversed, and the extraordinary circumstances test must be rejected.

I. THE EXTRAORDINARY CIRCUMSTANCES TEST ESTABLISHES AN UNLAWFUL PRESUMPTION OF UNREASONABLENESS.

As respondent concedes, to presume that a sentence is unreasonable merely because it falls outside the range

recommended by the Guidelines is contrary to law. Gov. Br. at 34-35, *Rita* v. *United States*, 127 S. Ct. 2456 (2007) (No. 06-5754). Such a presumption, by forbidding the trial judge from imposing a sentence outside the Guidelines range in the absence of supplemental supporting findings, violates the Sixth Amendment and infringes upon the district court's statutory discretion. See *Rita*, 127 S. Ct. at 2463-67; *United States* v. *Myers*, 439 F.3d 415, 417 (8th Cir. 2006).

The extraordinary circumstances test establishes a presumption of unreasonableness. It holds that a sentence outside the Guidelines range must be reversed unless an adequate, affirmative justification for deviating from that range is provided. *E.g.*, *United States* v. *Davis*, 458 F.3d 491, 496 (6th Cir. 2006), *petition for cert. filed*, No. 06-7784 (U.S. Nov. 13, 2006); *Myers*, 439 F.3d at 417-18. In other words, a non-Guidelines sentence is presumed unreasonable if it is not supported by sufficient evidence to the contrary.[1]

Respondent suggests that the extraordinary circumstances test does not necessarily mandate a finding of "unreasonableness" when a non-Guidelines sentence is unsupported by supplemental findings. Gov. Br. at 15 n.4. But the cases that respondent endorses, see *id.* at 13 & n.3, including the decision of the Eighth Circuit in this case, are to the contrary. Courts applying the test routinely hold that, when a non-Guidelines sentence is not supported by "extraordinary circumstances" (or some other level of additional justification), the sentence must perforce be deemed "unreasonable." See J.A. 129-39 (concluding that the District Court's sentence was "unreasonable" because it was not supported by "extraordinary circumstances"); see also,

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[1] The cases cited in respondent's brief demonstrate that the test requires some level of additional justification for *all* non-Guidelines sentences. *e.g.*, *Davis*, 458 F.3d at 496 ("[T]he farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification [must be]."), not merely those that deviate "dramatically" from the Guidelines range, *see* Gov. Br. at 38.

e.g., *United States* v. *Gillmore*, No. 06-3545, 2007 WL 2317369, at *6 (8th Cir. Aug. 15, 2007) ("[A non-Guidelines sentence] must be accompanied by extraordinary circumstances in order to be reasonable.") (internal quotations omitted). Respondent itself asserts that the purported lack of an "extraordinary" justification for the sentence in this case renders the judgment "unreasonable." Gov. Br. at 44.

Respondent also argues that, even if the test has the appearance of a presumption, it is better viewed as a "judicial frame of mind." *Id.* at 15 n.4. This odd label cannot change the nature of the test. It carries all of the inferences of a presumption: that one result is normally correct (*i.e.*, a non-Guidelines sentence is unreasonable), that the opposing party bears the burden to produce countervailing evidence, and that the favored result controls if such evidence is not offered. See *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 49 n.3 (2003), *cited in Rita*, 127 S. Ct. at 2463. Calling the test a "judicial frame of mind" does not change its inherent character; one may as well speak of a "judicial frame of mind" that a prevailing party in a civil rights case should be awarded attorney's fees, see *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 136 (2005) ("presumption" of fee award), or that a qualified minority employee who is terminated from a position should be deemed to have suffered discrimination, see *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) ("presumption" of discrimination).

Nor is there any merit in respondent's assertion that this Court "recognized" in *Rita* that the extraordinary circumstances test does not establish a presumption of unreasonableness when it "reject[ed] [such] a presumption . . . while reserving (in the same paragraph) the question whether proportionality review is valid." Gov. Br. at 15 n.4. Exactly what the Court "recognized" is open to debate. The opinion's juxtaposition of a presumption of unreasonableness and an extraordinary circumstances test could just as easily have

meant that the latter is a version of the former. In any event, *Rita* does not stand for the proposition cited by respondent.

The extraordinary circumstances test creates a presumption of unreasonableness for non-Guidelines sentences. It must be rejected for that reason.

II. THE EXTRAORDINARY CIRCUMSTANCES TEST MANDATES JUDICIAL FACTFINDING IN VIOLATION OF THE SIXTH AMENDMENT.

Respondent acknowledges that requiring district courts to justify non-Guidelines sentences with additional findings of fact "may create Sixth Amendment difficulties." *Id.* at 35-36 & n.10. It also concedes that several courts of appeals have defined the extraordinary circumstances test in this manner, as demanding a factual justification for non-Guidelines sentences. *Id.* Nevertheless, respondent argues that this factfinding component is not "inherent in proportionality review itself" and that the test, properly construed, contemplates that a district court may vary from the Guidelines range based solely on policy disagreements. *Id.* Because policy judgments may support a non-Guidelines sentence, the argument goes, the test does not mandate factfinding in support of non-Guidelines sentences and does not unconstitutionally limit district court discretion.

This position fails for a number of reasons. First, respondent must take the Eighth Circuit's proportionality analysis as it exists, not as respondent would like it to be. The Eighth Circuit in this case, in accord with the practices of other courts applying the test, overturned the judgment of sentence because the District Court purportedly failed to identify *facts* in support of the sentence. J.A. 139 ("[The sentence] lies outside the limited range of choice dictated by the facts of this case.") (internal quotations omitted); see also Pet. Br. at 16 n.5 (citing cases). Respondent has adopted the same definition in briefs filed in this Court. See Gov. Br. at 36, *Claiborne* v. *United States*, 127 S. Ct. 2245 (2007) (No.

06-5618) ("Gov. *Claiborne* Br.") ("[T]he judge may rely on any facts . . . to justify [an] out-of-Guidelines sentence.").

Only one opinion is cited by respondent in which a court of appeals has suggested that factfinding is not required to justify a non-Guidelines sentence. *United States* v. *Poynter*, 495 F.3d 349, 358-59 (6th Cir. 2007). But that case, like respondent's brief, simply states the proposition without any support and without any examples of its application. *Id.* Indeed, in the very same opinion, reversing an above-Guidelines sentence as unreasonable, the court of appeals suggests that the sentence might have been upheld had the trial judge identified additional aggravating *facts*. *Id.* at 354 ("Consider those who, unlike [defendant], flee the authorities and seek to obstruct their own conviction; those who do not accept responsibility for their actions; those who employ violence or use weapons to commit the offense; and those who stand convicted of a long list of prior sex offenses.").[2]

Moreover, having relied on the supposed availability of policy justifications to save the extraordinary circumstances test, respondent then emphasizes that such justifications can rarely – if ever – support a non-Guidelines sentence. District courts may not, respondent states, base a sentence on policy disagreements with congressional statutes, or even disagreements about perceptions of what Congress wants. Gov. Br. at 37 n.11. Nor may district courts apparently base a sentence on policy disagreements with the Guidelines, unless

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[2] Respondent's argument that the test cannot be viewed as "inherently" mandating factual findings because no court of appeals has "so held," Gov. Br. at 38, overlooks the numerous opinions that have explicitly required *facts* in support of non-Guidelines sentences, *see* Pet. Br. at 16-17, and ignores the reality that the only way "a judge can determine that a case is somehow different from the run of the mine (*i.e.*, 'extraordinary')" – and thereby gain authority to impose a non-Guidelines sentence – is to make findings of fact beyond those in the jury verdict, *see id.* *See also* Br. of Fed. Public & Cmty. Defs. & Nat'l Ass'n of Fed. Defs. at 10-12 ("Defs. Br.") (citing cases reversing sentences because the judge relied on reasons discouraged, prohibited, or not recognized by the Guidelines).

the *facts* of the case provide a basis for distinguishing it from the circumstances contemplated by the Guidelines. See Gov. Br. at 44-45, *United States* v. *Kimbrough*, No. 06-6330 (U.S. Aug. 30, 2007). As for other policy considerations, they are "not entitled to as much deference as . . . fact-based [considerations]." Gov. Br. at 37 n.11. The vaunted discretion of district courts to rely upon policy judgments in sentencing is, in reality, no discretion at all – reducing the number of non-fact based applications of the test to a nullity.

Nor can a district court satisfy the extraordinary circumstances test merely by greater articulation or explanation. Indeed, it would be quite odd if this were the case. Section 3553(c)(2) already mandates that, for sentences outside the range set forth in the Guidelines, the district court state on the record "the specific reason for the imposition of a sentence different from that described." 18 U.S.C. § 3553(c)(2). Courts of appeals would have no cause to invent – and respondent would have no cause to defend – an extraordinary circumstances test if the only effect of that test were to require district courts to provide the explanation already required by § 3553(c)(2). Either the test requires additional findings of fact, and therefore violates the Sixth Amendment, or it is wholly superfluous, and should be rejected as a potential source of confusion and error.

And, even if district courts *could* deviate from the Guidelines through solely policy-based explanations, that power would not cure the constitutional problem. Even then, respondent insists that there would be boundaries inside the statutory maximum and minimum that would restrict sentencing courts' discretion. Gov. Br. at 39-41. These boundaries violate *Apprendi*'s bright-line rule; absent judicially found facts established by a preponderance of evidence, district courts would be forbidden from sentencing beyond those boundaries. See *Rita*, 127 S. Ct. at 2466; see also *id.* at 2475-76 (Scalia, J., concurring in the judgment); see also Br. for Nat'l Ass'n of Criminal Def. Lawyers at 4-16.

Respondent's only reply to this problem is that the system it urges would not create "identifiable" limits on district courts' sentencing authority. Gov. Br. at 40-41. But, instead of avoiding the Sixth Amendment infirmity, this would doubly violate the Constitution. Not only would the federal sentencing system violate defendants' right to a jury trial,[3] but it also would violate their due process right to fair notice. The common law, as well as the Due Process Clause, has always required that a defendant be "ab[le] to predict with certainty" the maximum possible punishment "from the face of the . . . indictment" or criminal statute. *Apprendi* v. *New Jersey*, 530 U.S. 466, 478 (2000); see also *BMW* v. *Gore*, 517 U.S. 559, 574 (1996) ("[O]ur constitutional jurisprudence dictate[s] that a person receive fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a State may impose."). Respondent's proposal flunks that test.

III. THE EXTRAORDINARY CIRCUMSTANCES TEST CONTRAVENES THE SENTENCING REFORM ACT.

The Sentencing Reform Act directs the *sentencing judge* to consider the factors and purposes of § 3553(a) and determine the sentence that is "sufficient but not greater than necessary" to satisfy the purposes of sentencing. *Rita*, 127 S. Ct. at 2467. The district judge has the authority to weigh the various (and sometimes competing) considerations and craft an appropriate sentence based on the individual circumstances of the case. *Id.* at 2462-65. Any restriction that impinges on this authority is contrary to the statute. See *id.*; see also Br. of Families Against Mandatory Minimums at 5-18 ("FAMM Br.") (discussing parsimony and individualized sentencing).

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[3] *See* Pet. Br. at 18 ("Whether the . . . test [applies] to all sentences outside the Guidelines or only to those . . . 'significantly' outside the [range], the result is the same: the court of appeals has imposed an additional factfinding requirement and a limitation on the discretion of the district court to impose a sentence above or below a certain range.").

The extraordinary circumstances test imposes just such a restriction. It tells district courts that they may not impose a sentence outside the range recommended by the Guidelines unless they can present an "extraordinary" justification for doing so. *E.g.*, *United States* v. *Borho*, 485 F.3d 904, 912-16 (6th Cir. 2007). This engrafts onto the statute an additional provision – like the excised subsection (b) – requiring district courts to sentence within the Guidelines in the absence of adequate grounds for a departure. Cf. 18 U.S.C. § 3553(b) (2004) ("[T]he court shall impose a sentence . . . within the [Guidelines] range . . . unless the court finds that there exists [adequate] aggravating or mitigating circumstance[s] . . . ."). In fact, the burden on the district court to justify a non-Guidelines sentence under the test is materially indistinguishable from the burden on the district court to justify a departure under the mandatory Guidelines system, which this Court expressly rejected in *Booker*. See *United States* v. *Booker*, 543 U.S. 220, 259-61 (2005).

The test precludes district courts from complying with the statute in many cases. A district court operating under the test cannot impose a non-Guidelines sentence – even if the court concludes that such a sentence is "sufficient but not greater than necessary" – if the facts of the case are not sufficiently "extraordinary" in the eyes of the appellate court. *E.g.*, *Borho*, 485 F.3d at 912-16; see also J.A. 136-37. Respondent offers no rejoinder to this point, other than to restate its position that "proportionality review does not require an extraordinary justification for all out-of-Guidelines sentences" and "most sentences can be justified as reasonable based on a relatively straightforward explanation." Gov. Br. at 26, 32. But, even assuming *arguendo* that "most sentences" can be upheld without a showing of extraordinary circumstances, but see Pet. Br. at 18, respondent does not dispute that there will be cases in which the test prohibits a district court from imposing the sentence that is "sufficient but not greater than necessary," as the statute mandates. See

Gov. Br. at 21, 26, 31-32; see also Br. of Wash. Legal Found. & Allied Educ. Found. at 19-23 (noting that the Guidelines call for the statutory maximum sentence in many cases).

It is equally difficult to make sense of respondent's claim that the extraordinary circumstances test "promotes a balanced application of the Section 3553(a) factors." Gov. Br. at 14. Emphasis on the Guidelines range as *the only* benchmark is inconsistent with the Court's observation that it is the district court that decides how to weigh the § 3553(a) factors and resolves the inherent tensions and conflicts among them. *Rita*, 127 S. Ct. at 2463. The extraordinary circumstances test not only engrafts a new requirement onto the statute; it imposes a mandate that is inconsistent with the already-balanced structure of the statute and the discretion it plainly affords to sentencing courts. See, *e.g.*, J.A. 136-38.

IV. THE EXTRAORDINARY CIRCUMSTANCES TEST DISTORTS REASONABLENESS REVIEW.

This Court instructed in *Booker* that courts of appeals should review sentences for "reasonableness." 543 U.S. at 259-61. This standard, akin to review for abuse of discretion, asks whether the district court followed all statutory prerequisites and whether the final sentence represents a reasoned and rational exercise of discretionary judgment.[4] See *Rita*, 127 S. Ct. at 2465; see also *id.* at 2472 (Stevens, J.,

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[4] Respondent quibbles over use of the term "rational" to describe reasonableness review. *See* Gov. Br. at 28. This ignores that "reasonable" is often defined as synonymous with "rational," *e.g.*, *Webster's Third New Int'l Dictionary* 1892 (1993), and that this Court has on several occasions linked the terms, *e.g.*, *Reno* v. *Flores*, 507 U.S. 292, 309 (1993) (a regulation has a "reasonable foundation" if it "rationally pursues" a lawful purpose); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986) (an investment is "rational" if the individual has a "reasonable expectation" of profits). Respondent also seemingly defines reasonableness in terms of rationality: "If the district court's explanation *logically coheres* and is consistent with the totality of the factors, the appellate court upholds the sentence as reasonable." Gov. Br. at 25-26 (emphasis added).

concurring); *Koon* v. *United States*, 518 U.S. 81, 98 (1996). As this Court emphasized in *Rita*, the appellate court owes significant deference to the district court's choice of sentence, wherever it falls in the statutory range. 127 S. Ct. at 2465; *id.* at 2742 (Stevens, J., concurring) ("While reviewing courts may presume that a sentence within the advisory Guidelines is reasonable, appellate judges must still always defer to the . . . judge's individualized sentencing determination.").

Respondent tries to re-argue this point. It asserts that the level of deference owed to the district court's choice of sentence depends upon whether the final sentence is within or without the Guidelines: for those within the Guidelines, the sentence should be upheld in the absence of countervailing considerations; for those outside the Guidelines, the sentence should be reversed in the absence of countervailing considerations. See Gov. Br. at 8; see also J.A. 136-38.

This approach is inconsistent not only with *Booker* but with the very nature of discretion. That a district court has "discretion" with respect to a particular issue means that it may choose among a range of potential results, all of which will be presumed correct by the appellate court. *E.g.*, *Gasperini* v. *Ctr. for Humanities, Inc.*, 149 F.3d 137, 141 (2d Cir. 1998) (citing Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 754 (1982)). See generally Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173 (1978). So long as the rationale for the decision "logically coheres" and is consistent with the totality of relevant factors, the court of appeals will affirm. See Gov. Br. at 25-26. To state that less deference is owed to certain decisions is, in effect, to state that the district court lacks discretion to make those decisions and to remove the deferential standard entirely, replacing it with *de novo* review.

The only true "discretion" granted to district courts under the extraordinary circumstances test is to choose a sentence within the Guidelines. Under the test, courts of appeals will not presume sentences outside the Guidelines range to be

correct but will instead presume them to be unreasonable in the absence of facts deemed "extraordinary" by the appellate panel. *E.g.*, J.A. 136-38. And appellate courts will freely second-guess the district courts' weighing of the relevant factors. See, *e.g.*, *United States* v. *Garcia-Lara*, No. 06-3054, 2007 WL 2380991, at *6 (10th Cir. Aug. 22, 2007) ("[A] sentencing court may not accord ordinary facts extraordinary weight."). This is directly contrary to *Booker* and *Rita*, both of which recognized that "appellate courts must review sentences individually and deferentially whether they are inside the Guidelines range . . . or outside that range." *Rita*, 127 S. Ct. at 2474 (Stevens, J., concurring); cf. FAMM Br. at 19 ("The presumption of reasonableness upheld in *Rita* is . . . best understood as an example of the larger principle of appellate deference to the district court.") (emphasis omitted).

What respondent proposes is a restoration of a mandatory Guidelines regime, with the only change being that departures will be controlled not by the Guidelines, but by rules crafted by courts of appeals, each of which will assume the functions of a separate and independent sentencing commission. This is not the system that Congress or *Booker* envisioned.

Contrary to respondent's position, the extraordinary circumstances test finds no support in *Williams* v. *United States*, 503 U.S. 193 (1992), in which the Court, interpreting the pre-2003 version of § 3742(f), said that a non-Guidelines sentence should be reversed if the explanation offered by the district court does not "justify the magnitude of the departure [from the presumptive guideline range]." *Id.* at 204. The decision in *Williams* addressed not the appellate standard of "reasonableness" review under subsection (e), but the appellate rules for disposition and decision under subsection (f). See *id.* That discussion therefore cannot inform the interpretation of "reasonableness" under *Booker*, predicated as it was on the pre-2003 version of subsection (e) of § 3742. 543 U.S. at 260. Moreover, even if *Williams* could somehow be construed as addressing reasonableness review more

generally, the decision was premised on the view that the Guidelines were mandatory. 503 U.S. at 198-99. It therefore made sense for the Court to judge "reasonableness" exclusively by reference to the required range established by the Guidelines. *Id.* No longer is this the case. *Booker*, 543 U.S. at 259. The Guidelines no longer serve as the sole benchmark and no longer bind the district court. *Id.* The statements in *Williams* suggesting otherwise are simply inapplicable post-*Booker*. See *Rita*, 127 S. Ct. at 2472 (Stevens, J., concurring) ("After *Booker*, appellate courts are now to assess a district court's exercise of discretion 'with regard to § 3553(a).'") (quoting *Booker*, 543 U.S. at 261).

Respondent acknowledges that the several cases cited in *Booker* as exemplifying "reasonableness" review, addressing sentences imposed under an advisory Guidelines scheme in supervised release revocation proceedings, *e.g.*, *United States* v. *White Face*, 383 F.3d 733, 739 (8th Cir. 2004), do not invoke an "extraordinary circumstances test" or "proportionality doctrine." Gov. Br. at 23 n.6. It offers no explanation for this omission, other than to suggest that "initial federal sentencings . . . implicate more complex sentencing purposes and afford courts greater sentencing options [than revocation proceedings]." *Id.* In fact, there is no meaningful distinction between the purposes, factors, and options at issue in a revocation proceeding and those at issue in an initial sentencing. See 18 U.S.C. § 3583(e). And, even if respondent were correct, this is hardly a reason to accord a different interpretation to the Sentencing Reform Act in the supervised release setting than in others. Nor is it consistent with *Booker*, which instructed that the same form of reasonableness review would apply "across the board." 543 U.S. at 263. If anything, respondent's argument establishes again that the extraordinary circumstances test is in no way moored to the language of the statute.

Respondent misapprehends the nature of reasonableness review when it complains that, without the Guidelines as a

benchmark, "appellate courts would be forced in every case to construct anew the range of reasonable sentences for each particular defendant." Gov. Br. at 18. It is not the job of the court of appeals to "construct" a range of appropriate final sentences. Rather, the appellate court's job is to review the sentence actually imposed by the district court and determine, based on the explanation offered, whether that sentence is reasonable. See *Booker*, 543 U.S. at 259-61; Steven Childress & Martha Davis, *Federal Standards of Review* § 7.06[B][3] (2004). The court of appeals should ensure that the district judge exercised discretion in a rational manner, not decide for itself the appropriate sentence in a given case. *Williams*, 503 U.S. at 205 ("[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.").

This standard does not constitute an "abdication" of appellate review. Gov. Br. at 27. Courts of appeals retain the authority to correct legal error and ensure that the district court abides by the statutory directive to consider all relevant factors and impose the sentence that, in its view, is "sufficient but not greater than necessary." § 3553(a); see also *Koon*, 518 U.S. at 98. They can reverse a sentence when the district court relies on a factor or conclusion that is irrational or irrelevant. *Rita*, 127 S. Ct. at 2472-73 (Stevens, J., concurring); *id.* at 2483 & n.6 (Scalia, J., concurring); see also *Booker*, 543 U.S. at 261; cf. *United States* v. *Valdes*, No. 06-15951, 2007 WL 2700598, at *1 & n.2 (11th Cir. Sept. 18, 2007) (per curiam) (reversing judgment when judge may have increased sentence based on personal bias). They can also overturn a sentence outside the Guidelines range when the district court has not explained why that range did not reflect an appropriate sentence. See § 3553(a)(4), (a)(6), (c)(2); cf. *United States* v. *Sanchez-Juarez*, 446 F.3d 1109, 1117-18 (10th Cir. 2006) (reversing judgment when judge failed to address defendant's argument for lesser sentence). Far from "abdicating" appellate review, this approach honors and

effectuates the separate roles of the appellate and district courts in the sentencing process.

Nor will this approach result in "the kind of unchecked sentencing discretion that existed in the pre-Guidelines regime." Gov. Br. at 28. The disparities that existed prior to the advent of the Guidelines arose in large part from the lack of standards guiding district courts and the absence of appellate review. See S. Rep. No. 98-225, at 41 & n.143, 65 (1983); see also Norval Morris, *Towards Principled Sentencing*, 37 Md. L. Rev. 267, 272-74 (1977). Neither of these conditions now exists. The Sentencing Reform Act outlines a series of factors and purposes to guide sentencing courts, including Guidelines that recommend a range of sentences for each offense. The Act also provides for appellate review, allowing courts of appeals to overturn a judgment of sentence if it reflects a failure to weigh all of the factors and purposes of § 3553(a). *Booker*, 543 U.S. at 261. This will prevent different district courts in different parts of the country from unjustifiably applying different sentencing policies to similarly situated defendants. For example, if a single district court treats prior military service as an aggravating factor – when all other courts treat such service as a mitigating factor – the court of appeals may reverse sentences based on that unique judgment if the district court fails to offer a rational explanation for how its treatment of military service considers "the need to avoid unwarranted sentence disparities." § 3553(a)(6). This standard provides courts of appeals with the tools necessary to address unwarranted disparities in the federal system, without the need for an extra-statutory presumption of unreasonableness.[5]

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[5] Advisory guidelines systems, with deferential standards of appellate review, have proven effective in reducing sentencing disparities in the states in which they have been adopted. *See* John F. Pfaff, *The Continued Vitality of Structured Sentencing Following* Blakely*: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. Rev. 235, 268, 299 (2006); Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the Post-*Blakely *Era*, 17 Fed. Sent'g R. 233 (2005).

Moreover, reasonableness review was never intended to ensure mechanistic uniformity in sentencing. *Booker*, 543 U.S. at 263 ("We cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure. . . . [b]ut . . . that mandatory system is no longer an open choice."). The Court inferred this standard to promote a balanced application of the Sentencing Reform Act in a manner that respects the Sixth Amendment and allows for a continuing dialogue between district courts and the Sentencing Commission. See *id.* at 261-65; see also *Rita*, 127 S. Ct. at 2463-65. The Court emphasized that achieving this goal requires a deferential standard of review, which permits district courts to exercise discretion in consulting and applying the advisory Guidelines within the general bounds of reasonableness. *Rita*, 127 S. Ct. at 2463-65; see *id.* at 2472-74 (Stevens, J., concurring); *id.* at 2482-83 (Scalia, J., concurring in the judgment); cf. Defs. Br. at 3-29 (arguing that deferential review is necessary to foster dialogue between district courts and the Commission).

Respondent repeatedly challenges petitioner to define what the "reasonableness" standard means. Gov. Br. at 10, 28-29; see also Gov. *Claiborne* Br. at 29-30. But this Court has already answered that challenge. The opinion in *Rita* demonstrates that, on review for reasonableness, appellate courts should focus on the reasons offered by the district court to determine if the final sentence, whether it falls within or without the Guidelines range, represents an abuse of discretion. 127 S. Ct. at 2465, 2468-70. Any further attempt by respondent or the courts of appeals to engraft onto this standard an additional test or rule that is fact-driven, Guidelines-centric, and sufficiently vague to give appellate courts ample chance to second-guess the reasoned judgments of district courts necessarily runs afoul of the Court's Sixth Amendment holdings in *Blakely*, *Booker*, and *Cunningham*.

Respondent's oft-expressed concerns about uncontrolled sentencing disparities stemming from powerlessness in the

courts of appeals are overblown. Sentencing must still be rationally grounded in the factors of § 3553(a), see *Booker*, 543 U.S. at 260-61, the reasons offered by the district court must logically cohere, see *Koon*, 518 U.S. at 101-12, and those reasons must fit the facts of the case, see *Rita*, 127 S. Ct. at 2470. And, although respondent decries a supposed 48.6% increase in non-Guidelines sentences since *Booker*, see Gov. Br. at 42-43, the percentage of non-Guidelines sentences remains low at 13.9%, only 2.5% higher than in the pre-PROTECT Act years, see *id.* at 31a.[6] If, despite access to a "generation's worth" of Guidelines wisdom and to legal databases containing the opinions of their colleagues around the country, sentencing judges were to somehow return to pre-1984 practices, then Congress can reduce sentencing court discretion in a number of ways consonant with the Sixth Amendment. Respondent's proposed rule, however, seeks only a return to the familiar – "soft constraints" on a presumptive Guidelines system that is not materially different (except for its judicial rather than legislative origins) than the sentencing schemes struck down in *Blakely*, *Booker*, and *Cunningham*. Although it is keen strategy for respondent to repeatedly ask that the problem be solved in its own way, it is patent that respondent's way does not conform with Sixth Amendment principles.

The extraordinary circumstances test will, moreover, give rise to greater uncertainty and confusion in the federal system. Neither respondent nor the courts of appeals have defined the test in a manner that would allow for objective application. The Eighth Circuit has said that an "extraordinary variance" requires "extraordinary circumstances" while lesser variances require an "appropriate" justification. J.A. 136-38. The Tenth Circuit has stated that an "extreme" variance must be supported by a "dramatic" justification, a "substantial"

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[6] Petitioner cannot confirm the accuracy of respondent's statistics because the underlying data is, at least in part, not available to the public. It was apparently provided to respondent by the Sentencing Commission.

variance must be supported by a "compelling" justification, and a "significant" variance must be supported by a "sufficient" justification. *United States* v. *Hildreth*, 485 F.3d 1120, 1127-28 (10th Cir. 2007). The Sixth Circuit has suggested that a "little" variance requires only a "little" justification. *Poynter*, 495 F.3d at 357; cf. *United States* v. *Wallace*, 458 F.3d 606, 614 (7th Cir. 2006) (stating that a "World Series" variance requires a "World Series" justification), *petition for cert. filed*, No. 06-7779 (U.S. Nov. 13, 2006). These statements are nothing more than sloganeering, devoid of substantive content and of little value to courts trying to apply the test. Cf. Arg. Tr. at 43, *Claiborne*, 127 S. Ct. 2245 (No. 06-5618) (noting that the "extraordinary circumstance" test "sounds like a slogan") (Breyer, J.). None of them explains objectively when a variance is so substantial as to require further justification or the level of justification necessary to support such a variance.[7] Cf. Br. for the N.Y. Council of Def. Lawyers at 5-8 ("NYCDL Br.") (discussing inconsistent application of the test, and tendency of circuit courts to affirm above-Guidelines sentences and reverse below-Guidelines sentences).

The sole manner to assure effective and consistent appellate review, in accordance with *Booker* and *Rita*, is to require that courts of appeals focus on the reasons offered by the district court. Only if those reasons do not rationally support the final sentence in light of the statutory prerequisites should the appellate court overturn the sentence.

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[7] Nor does respondent offer any workable standard. It states that, in measuring the degree of variance for purposes of applying the test, "courts should not focus solely on the percentage deviation from the Guidelines range" but should consider "all relevant measures of the extent of a variance – including percentage, absolute time, and any difference in the nature of the punishment." Gov. Br. at 44 n.15. How this collection of conflicting and ambiguous measures will lend any greater certainty or consistency to the sentencing process is unclear.

V. THE DISTRICT COURT'S CHOICE OF SENTENCE IN THIS CASE WAS REASONABLE.

The sentence imposed in this case was reasonable. The District Court conducted a lengthy sentencing hearing, heard arguments by both parties concerning the factors and purposes relevant to sentencing, and issued a detailed memorandum explaining the rationale for the final sentence. J.A. 60-127. Neither respondent nor the court of appeals has identified any cognizable legal or factual error underlying the judgment or suggested that the District Court's reasoning does not "logically cohere." Gov. Br. at 25. Indeed, respondent concedes that the factors upon which the District Court relied "were appropriate considerations under Section 3553(a)" and "could reasonably have [supported] . . . a sentence below the Guidelines range." *Id.* at 45. Respondent – as did the Eighth Circuit – simply disagrees with the District Court's judgment that a sentence of three years' probation is warranted.

This disagreement is not a valid reason to overturn the judgment. Appellate review for abuse of discretion should address itself primarily to the rationale, not the result. Childress & Davis, *supra*, § 7.06[B][3]; see Friendly, *supra*, at 754. An appellate court must affirm a sentence, even one it would not have itself imposed, so long as the district court offered a reasonable and rational justification for the judgment. See *Rita*, 127 S. Ct. at 2465; *Koon*, 518 U.S. at 98. Respondent makes no argument that the District Court in this case failed to provide a rational explanation for its decision.

Nevertheless, respondent tries its best to recharacterize Mr. Gall as a recidivist felon, deserving of a significant term of imprisonment. It paints him as a devious and shrewd criminal operator who was able to exploit a drug distribution scheme and then escape when the police got too close. Gov. Br. at 45-50. Quite a different picture emerges from a reading of the District Court record and opinion: Mr. Gall was a college student, prone to addiction, who got caught up with the wrong

people, made some serious mistakes, but recognized his errors and voluntarily rehabilitated himself. See, *e.g.*, J.A. 97-101. To the extent respondent argues otherwise, it runs counter to the record and the findings of the District Court.[8]

Respondent also argues that the sentence imposed in this case is "the most lenient sentence available" and, as such, should be "reserved [only] for cases that warrant [such a] punishment." Gov. Br. at 45. Ignoring the fact that the sentence imposed was *not* the most lenient one available (for example, a lesser term of probation or fewer conditions of release could have ordered), it is absurd to suggest that a district court may not impose a sentence near the end of the statutory range simply because a "better" defendant may someday be convicted of a similar crime. This standard would preclude courts from ever assessing a non-Guidelines sentence, since one can always hypothesize a more sympathetic defendant. Indeed, the "perfect" defendant, who would presumably deserve the most lenient sentence, will likely never appear before a court because that defendant would likely never be indicted: for example, the "perfect" defendant that respondent imagines in this case – one who turned himself into authorities immediately upon renunciation of the scheme, see *id.* at 46 – may not have been prosecuted at all under the standards set forth in the United States

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[8] Respondent alleges that Mr. Gall withdrew from the conspiracy because "he was very nervous that [Theodore Sauerberg] was telling too many people about the business." Gov. Br. at 3. Although investigating officers reported that Mr. Rinderknecht said as much, Mr. Gall indicated that he had withdrawn in order to concentrate on his collegiate studies. Sealed J.A. 148-52. Moreover, other individuals recalled that Mr. Sauerberg had moved to Spain in July 2000, more than a month *before* Mr. Gall left the conspiracy. *Id.* The District Court did not explicitly resolve this conflict but suggested, by finding that Mr. Gall "voluntarily . . . withdrew from the conspiracy," that it credited Mr. Gall's version of events. J.A. 123. Whatever the case, the District Court did not adopt the self-interested account of Mr. Rinderknecht, on which respondent now belatedly relies.

Attorney's Manual. See *U.S. Attorney's Manual* §§ 9-27.200 to 9-27.270, 9-27.600 to 9-27.630 (2007).

The District Court considered all of the factors of § 3553(a), including the need to avoid unwarranted sentencing disparities and to promote general deterrence. It acknowledged the need to avoid unwarranted disparities, see J.A. 119, but adjudged this disparity a warranted one and gave specific reasons that "logically cohere" and are "consistent with the totality of the factors." See Gov. Br. at 25-26. It also explained that, because Mr. Gall had voluntarily withdrawn from the conspiracy and rehabilitated himself, a sentence of imprisonment would promote "not respect but derision of the law." J.A. 124-26; see NYCDL Br. at 9-21 (discussing the penological value of probation). This suggests that, in the District Court's view, a sentence of imprisonment would not serve the purpose of general deterrence because it would signal to others that renunciation of criminal activities offers no benefit in terms of a reduced sentence, when compared to those who persist in criminal conduct. More importantly, the record as a whole – which, as this Court said in *Rita*, must be considered in assessing whether a district court honored its obligations under § 3553(a), see 127 S. Ct. at 2468-69 – shows that the District Court understood the need to address unwarranted disparities and general deterrence and accepted the parties' arguments concerning these and other factors. See J.A. 92, 97.

No error has been identified in the District Court's judgment that would render the sentence unreasonable. Notwithstanding the Eighth Circuit's disagreement with the outcome, the District Court's rationale and final sentence were reasonable, and the sentence should have been affirmed.

CONCLUSION

For these reasons, the Court should reverse the decision of the Court of Appeals for the Eighth Circuit and remand with instructions to affirm the judgment of the District Court.

Respectfully submitted,

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(6)

No. 06-7949

In the Supreme Court of the United States

BRIAN MICHAEL GALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in assessing the reasonableness of a sentence outside of the advisory guidelines range under *United States* v. *Booker*, 543 U.S. 220 (2005), a court of appeals should require the strength of the justification for the sentence to bear a proportional relationship to the degree of the variance.

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In the Supreme Court of the United States

No. 06-7949

BRIAN MICHAEL GALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 129-139) is reported at 446 F.3d 884. The sentencing memorandum of the district court (J.A. 118-127) is reported at 374 F. Supp. 2d 758.

JURISDICTION

The judgment of the court of appeals (J.A. 140) was entered on May 12, 2006. A petition for rehearing was denied on July 7, 2006 (J.A. 141). On September 19, 2006, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including November 4, 2006. On November 1, 2006, Justice Alito further extended the time to and including November 22, 2006, and the petition was filed on that date. The petition was granted on June 11, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-30a.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Iowa, petitioner was convicted of conspiring to distribute methylenedioxymethamphetamine (MDMA or ecstasy), in violation of 21 U.S.C. 841(b)(1)(C) and 846. After calculating an advisory range under the United States Sentencing Guidelines (Sentencing Guidelines or Guidelines) of 30-37 months of imprisonment, the district court imposed a sentence of 36 months of probation. The court of appeals reversed the sentence and remanded for resentencing, concluding that the extraordinary extent of the variance was not justified by comparably strong justifications. J.A. 129-139.

1. In February or March 2000, petitioner entered into a conspiracy with Luke Rinderknecht and others to distribute ecstasy. In the first few months of the conspiracy, petitioner purchased several hundred ecstasy tablets from Rinderknecht and distributed them. J.A. 24, 130, 146, 147, 149, 150, 152.

In May 2000, petitioner decided to take on a larger role. Rinderknecht, who was moving to California, called a meeting with petitioner and another co-conspirator, Theodore Sauerberg, to discuss how the drug operation would work once Rinderknecht had moved. The three agreed that Rinderknecht would send ecstasy to Sauerberg, who would transfer it to petitioner, and petitioner would sell it to others for further distribution. J.A. 130, 147, 148-149, 150, 151.

Pursuant to that arrangement, Rinderknecht sent Sauerberg two shipments of 5000 ecstasy tablets each. Sauerberg distributed the ecstasy to petitioner in 1000-tablet incre-

ments. Petitioner, in turn, sold the ecstasy to his contacts for resale. J.A. 130-131, 147-149, 151.[1]

By September 2000, petitioner became worried about the risks involved in continuing to participate in the conspiracy. He informed Rinderknecht that month that he no longer wanted to be involved because he was very nervous that Sauerberg was telling too many people about the business. In total, petitioner made between $30,000 and $40,000 from the conspiracy. J.A. 123 n.3, 131, 148, 152.

Law enforcement authorities later discovered the conspiracy and arrested Rinderknecht and Sauerberg. Federal agents then interviewed petitioner, who acknowledged his participation. In 2004, after a warrant was issued for his arrest, petitioner surrendered to authorities in Iowa. J.A. 131.

2. On April 28, 2004, a federal grand jury sitting in the Southern District of Iowa returned an indictment charging petitioner and seven others with conspiracy to distribute ecstasy, cocaine, and marijuana, in violation of 21 U.S.C. 841(b)(1) (2000 & Supp. IV 2004) and 21 U.S.C. 846. J.A. 1, 8-11. On March 2, 2005, petitioner pleaded guilty, pursuant to a plea agreement, to conspiracy to distribute ecstasy. J.A. 12-23. As part of the plea agreement, the parties stipulated that petitioner was responsible for the distribution of at least 2500

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[1] Petitioner is incorrect in asserting (Br. 4) that the 10,000 tablets from those two shipments were the total distributed by the entire conspiracy during the period of his participation. Petitioner himself acknowledged distributing additional quantities before those two shipments. See J.A. 151; see also, *e.g.*, J.A. 130 (petitioner purchased 100 ecstasy tablets on six occasions before the shipments); J.A. 147 (petitioner purchased 200 to 3000 tablets at a time between March and May 2000); J.A. 149 (co-conspirator purchased 20 to 50 tablets from petitioner on four or five occasions in April 2000); J.A. 152 (customer purchased ecstasy from petitioner in February 2000). Moreover, others besides petitioner distributed ecstasy as part of the conspiracy. See J.A. 149-150 (co-conspirator purchased ecstasy directly from Sauerberg for distribution); J.A. 151 (petitioner suspected as much).

grams (or 10,000 tablets) of ecstasy. J.A. 25, 152. They also stipulated, based on petitioner's withdrawal from the conspiracy in September 2000, that the November 1, 1999, edition of the Sentencing Guidelines would apply to his sentencing. J.A. 13 n.1, 131.

3. Before petitioner's sentencing, this Court decided *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial factfinding under mandatory federal Sentencing Guidelines. *Id.* at 226-244. As a remedy for that constitutional violation (*id.* at 244-268), the Court severed two provisions of the Sentencing Reform Act of 1984 (SRA or Act), 18 U.S.C. 3551 *et seq.* The first was 18 U.S.C. 3553(b)(1) (Supp. IV 2004), which had required courts to impose a Guidelines sentence. "So modified, the [SRA] makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." *Booker*, 543 U.S. at 245-246 (citations omitted). The Court also severed an appellate-review provision, 18 U.S.C. 3742(e) (2000 & Supp. IV 2004), which required de novo review of decisions to depart from the Guidelines and cross-referenced excised Section 3553(b)(1). *Booker*, 543 U.S. at 259-261. The Court replaced that provision with review for "unreasonableness," under which courts of appeals determine "whether the sentence 'is unreasonable' with regard to [18 U.S.C.] § 3553(a)." 543 U.S. at 261.

Petitioner faced a statutory maximum sentence of 20 years of imprisonment. 21 U.S.C. 841(b)(1)(C); J.A. 162. The Presentence Investigation Report (PSR) recommended a base offense level of 24 under Sentencing Guidelines § 2D1.1, based on the parties' stipulation that petitioner was responsible for the distribution of 10,000 ecstasy tablets. The PSR also recommended a two-level reduction for satisfying the safety-

valve criteria under Guidelines § 2D1.1(b), and a three-level reduction for acceptance of responsibility under Guidelines § 3E1.1. Those adjustments generated a total offense level of 19. That offense level, combined with petitioner's criminal history category of I, yielded a recommended Guidelines range of 30 to 37 months of imprisonment. J.A. 131-132, 152-154, 163.[2]

At sentencing, petitioner urged the district court to sentence him to probation, based on either a downward departure under the Guidelines or consideration of the other sentencing factors in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). Petitioner emphasized that he had withdrawn from the conspiracy and rehabilitated himself and that his family and two contract employees depended on him. J.A. 72-82, 132-133. The government did not contest that petitioner had led a law-abiding life since withdrawing from the conspiracy. The government noted, however, that he had played a significant role in a serious drug conspiracy and earned a large profit as a result. The government also noted that Congress and the United States Sentencing Commission (Sentencing Commission or Commission) had concluded that ecstasy distribution was an even more serious offense than the 1999 Guidelines reflected and had substantially increased the associated penalties. See Ecstasy Anti-Proliferation Act of 2000, Pub. L. No. 106-310,

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[2] The PSR's conclusion that petitioner qualified for a reduction under Guidelines § 2D1.1 was incorrect. Petitioner did not qualify for that reduction under the version of the Guidelines in effect on November 1, 1999, which the parties had stipulated applied to his offense. Although petitioner satisfied the safety-valve criteria in Guidelines § 5C1.2, the two-level reduction under the applicable version of the Guidelines applied only if a defendant's offense level was 26 or greater, and petitioner's offense level was never greater than 24. See Sentencing Guidelines § 2D1.1(b)(6) (1998). The United States Sentencing Commission did not eliminate the offense-level restriction until 2001. See *id.* App. C, amend. 624 (effective Nov. 1, 2001). The government, however, did not object to the two-level adjustment under Section 2D1.1.

§§ 3661-3664, 114 Stat. 1241-1244; Sentencing Guidelines App. C., amends. 609, 621 (effective May 1, 2001, and Nov. 1, 2001). Imprisonment was therefore necessary, the government argued, to reflect the seriousness of the offense, to provide adequate general deterrence, and to avoid unwarranted disparity. J.A. 82-92, 133.

The district court adopted the Guidelines calculation in the PSR and rejected petitioner's arguments for a downward departure. J.A. 96, 119-122. The court, however, varied from the Guidelines range and imposed a sentence of 36 months of probation based on the sentencing factors in Section 3553(a). J.A. 9, 118. In explaining that decision, the court stated:

> The Court in particular has taken into account [petitioner's] voluntary and explicit withdrawal from the conspiracy in September of 2000; [his] exemplary behavior while on bond; the support manifested by family and friends who have attested to [his] character; the lack of criminal history, especially a complete lack of any violent criminal history; and the immaturity of [petitioner].

J.A. 97.

In addressing petitioner's immaturity, the district court stated that this Court had based its decision in *Roper* v. *Simmons*, 543 U.S. 551 (2005), "on studies indicating adolescents are less culpable than adults for their actions." J.A. 98; see J.A. 123 n.2. Although *Roper* concerned only individuals who commit death-eligible crimes before turning 18, and petitioner was 21 at the time of his offense, the court stated that *Roper* was still relevant because a recent study from the National Institutes of Health suggests "that the critical region of the brain that inhibits risky behavior is not fully formed until age 25." J.A. 97-98; see J.A. 123 n.2. The court also noted that Sentencing Commission findings indicate that recidivism rates decrease as age increases. J.A. 98, 123 n.2. In

addressing the seriousness of the offense, the court stated that "the offense level based solely upon drug quantity does not adequately reflect the offense conduct." J.A. 100; see J.A. 127 n.5. The court refused to count petitioner's $30,000 to $40,000 in illegal profits against him, reasoning that petitioner, "who is from a working-class family and has few financial resources," showed fortitude in "turn[ing] his back on * * * 'easy money.'" J.A. 124 n.3. The court did not discuss how a probationary sentence would serve general deterrence.

4. The government appealed, arguing that the probationary sentence was unreasonable. The court of appeals agreed, and it therefore vacated petitioner's sentence and remanded for resentencing. J.A. 129-139.

The court of appeals stated that reasonableness review is "akin to our traditional review for abuse of discretion." J.A. 136 (citation omitted). The court further explained that sentences outside the Guidelines range "are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. 3553(a)." J.A. 137 (citations omitted). In determining the adequacy of the justification, the court stated, it applies a principle of proportionality: "How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed." *Ibid.* (citations omitted).

The court of appeals concluded that the difference between 30 months of incarceration and probation constituted an "extraordinary variance," and that the variance was "not supported by extraordinary justifications." J.A. 138. In particular, the court held that the district court had given too much weight to petitioner's withdrawal from the conspiracy and post-offense rehabilitation while giving too little consideration to the seriousness of his offense. J.A. 138-139. The court stressed that the offense was very serious because of the significant health risks and dangers from the use of ec-

stasy, the large quantities of ecstasy involved in the conspiracy, and the substantial illicit profit that petitioner had earned. *Ibid.* The court also stated that the district court had improperly relied on general studies indicating that a lack of maturity among adolescents can lead to impetuous actions without tying that conclusion to petitioner's specific maturity level when he committed the offense or explaining how his criminal conduct was impetuous or ill-considered. J.A. 138. Finally, the court concluded that the record failed to show that the district court had considered the extent to which a probationary sentence would result in unwarranted sentencing disparity. J.A. 139.

SUMMARY OF ARGUMENT

Courts of appeals reviewing sentences for reasonableness under *United States* v. *Booker*, 543 U.S. 220 (2005), should apply a principle of proportionality, under which a sentence that significantly varies from the advisory guidelines range should have a correspondingly strong justification. Such a framework is essential for appellate review to fulfill its function under *Booker* of ironing out sentencing differences and promoting Congress's goals of avoiding unwarranted sentencing disparities.

Contrary to petitioner's suggestion, proportionality review does not require an "extraordinary" justification for every non-Guidelines sentence. Only sentences that dramatically vary from the range require substantial justification. Similarly, proportionality review does not demand that every variance be supported by a "fact" that is not encompassed within the jury verdict or guilty plea. Considerations of policy, as well as facts, can support a variance; the test is the cogency and strength of the rationale, not whether it is fact-based. Proportionality review is a useful tool of appellate review, not a rigid presumption. Rather than mirroring the "presumption

of unreasonableness" for non-Guidelines sentences that this Court rejected in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), proportionality review reflects practical realities (*i.e.*, sentences that diverge widely from the Sentencing Commission's expert judgment present an empirically greater possibility of unreasonableness) and legal necessities (*i.e.*, greater scrutiny of sentences at the extremes is inherent in any substantive reasonableness review).

The proportionality principle is consistent with *Booker*'s recognition that appellate review in an advisory Guidelines system would continue to move sentencing in Congress's preferred direction of avoiding unwarranted disparities. And proportionality review can perform that function only if courts consult the Guidelines, rather than some other benchmark, in assessing whether a sentence is unreasonably severe or lenient. Indeed, it is unclear how the *Booker* remedial opinion's effort to reconcile the advisory Guidelines system with Congress's intent to reduce disparity can succeed without proportionality review. The Guidelines reflect application of the Section 3553(a) factors by an expert commission. They have evolved over time based on empirical data. And they reflect Congress's general policy judgments about sentencing. There is no other nationally uniform and legitimate source of objective guidance about typically reasonable sentences for categories of offenses and offenders.

The abuse-of-discretion standard adopted by *Booker* is not inconsistent with proportionality review. Requiring a stronger justification for a sentence that varies dramatically from the typical sentence is fully consistent with respecting the district court's superior vantage point in sentencing individual defendants. Proportionality review allows the courts of appeals to play a role that district courts cannot: surveying a broader range of cases and evaluating the cogency and persuasiveness of the district court's justification. And propor-

tionality review is necessary to avoid the disparity that would flourish if each district court had virtually unlimited freedom to impose any sentence (even one far from the Guidelines) for virtually any reason at all.

Significantly, petitioner and his amici offer no alternative form of appellate review that has any real capacity to restrain unwarranted disparity. Petitioner denies that appellate courts can review the balance of the Section 3553(a) factors struck by the district court, and he argues that only a wholly irrational sentence that *no* judge could possibly have imposed may be reversed as unreasonable. But this Court in *Booker* had substantial freedom to fashion a standard of appellate review, and it chose reasonableness review, not rationality review. Moreover, petitioner's approach would render appellate review toothless. It would effectively license almost unbounded discretion by sentencing judges, with erratic results that turned on the identity of the particular judge. It is impossible to conceive that the Congress that enacted the Sentencing Reform Act would approve that result.

Nothing in the Sentencing Reform Act commands the exceedingly limited appellate review that petitioner advocates. Section 3553(a) contains several factors that make the Guidelines relevant, and nothing that excludes their consideration on appeal (even when a judge permissibly decides to vary from them). And both Section 3553(a)(6)'s mandate to avoid unwarranted disparity and Section 3553(c)'s requirement of a specific reason for sentencing outside the range support the imposition of proportionality review. Such review will foster better explanations by district courts and thus will help the Sentencing Commission refine the Guidelines over time.

Nor is there anything in the Sixth Amendment that is offended by proportionality review. A judge is not required to support a sentence outside the range--even one signifi-

cantly outside the range—with a *fact* not found by the jury or admitted by the defendant. Rather, the issue is the persuasiveness of the justification in relation to the sentence imposed—regardless whether the justification is based on policy or fact. This Court has made clear that the Sixth Amendment line is crossed only when a sentencing scheme requires a court to find a fact to exceed a defined level. Since policy considerations can support a sentence different from the level recommended by the Guidelines, and since appellate decisions on reasonableness will not define rigid levels of maximum punishment, proportionality review is consistent with the Constitution. And proportionality review does not restore mandatory guidelines or otherwise prevent district courts from exercising discretion. It insists only that the reasons for the sentence be strong enough to support the balance struck among the Section 3553(a) factors. Moreover, petitioner's view of the Sixth Amendment would call into question not just the proportionality principle, but any meaningful appellate review for reasonableness. As such, petitioner's argument cannot be reconciled with the *Booker* remedial opinion.

In this case, the district court's balance of the Section 3553(a) factors was unreasonable. The judge correctly calculated an advisory range of 30-37 months of imprisonment for petitioner's serious drug trafficking offense, but dropped the sentence to probation. While the factors that the court cited, such as petitioner's withdrawal from the conspiracy, lack of significant criminal history, and behavior while on bond, could readily support *some* lesser sentence, the complete elimination of jail time—the most extreme lesser sentence available—was neither reasonably supported by the record nor consistent with the goals of just punishment, deterrence, and the avoidance of disparity embodied in Section 3553(a).

ARGUMENT

PETITIONER'S PROBATION SENTENCE WAS UNREASONABLE BECAUSE THE DISTRICT COURT DID NOT PROVIDE A SUFFICIENT JUSTIFICATION TO SUPPORT THE EXTENT OF THE VARIANCE FROM THE ADVISORY RANGE

In *Rita* v. *United States*, 127 S. Ct. 2456 (2007), this Court held that appellate courts may adopt a presumption of reasonableness on appeal for a sentence within the advisory Sentencing Guidelines range. That holding recognized that the Sentencing Commission, in formulating the Guidelines, and the sentencing judge, in imposing sentence, are "carrying out the same basic § 3553(a) objectives." *Id.* at 2363. When the judgments of the Commission and the sentencing judge coincide, there is good reason to assume that the sentence is reasonable. *Id.* at 2465. In contrast, when the sentence imposed is outside the Guidelines range, the basis for that practical assumption no longer exists. And when the sentence varies *extraordinarily* from the range, there is a significant risk that the sentence is unreasonable and will result in unwarranted disparity. Proportionality review by appellate courts serves to mitigate that risk. By ensuring that a judge's outside-the-range sentence has an appropriately strong justification under Section 3553(a), the proportionality principle provides a framework for appellate review that is consistent with *United States* v. *Booker*, 543 U.S. 220 (2005), the SRA, and the Constitution, and that gives content to the "substantive" reasonableness review that *Booker* envisioned. See *Rita*, 127 S. Ct. at 2467-2468.

I. PROPORTIONALITY REVIEW IS CONSISTENT WITH *UNITED STATES* v. *BOOKER*, THE SENTENCING REFORM ACT, AND THE SIXTH AMENDMENT

In *United States* v. *Booker*, this Court preserved appellate review of sentences under the SRA. 543 U.S. at 260. The Court directed appellate courts to review the reasonableness of each sentence in light of the factors in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004) and the district court's statement of reasons under 18 U.S.C. 3553(c) (2000 & Supp. IV 2004). *Booker*, 543 U.S. at 261-264. The Court recognized that reasonableness review could not "provide the uniformity that Congress originally sought" when it enacted the SRA and its original scheme of mandatory Guidelines. *Id.* at 263. Nevertheless, reasonableness review would still "tend to iron out sentencing differences," *ibid.*, and thereby "move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264-265. To make good that promise, courts reviewing sentences for unreasonableness should apply a principle of proportionality to evaluate whether the sentences are justified based on the sentencing factors in Section 3553(a), as a majority of the courts of appeals have done.[3]

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[3] Nine courts of appeals have adopted proportionality review, and none has rejected it. See *United States* v. *Smith*, 445 F.3d 1, 4 (1st Cir. 2006); *United States* v. *Manzella*, 475 F.3d 152, 161 (3d Cir. 2007); *United States* v. *Moreland*, 437 F.3d 424, 434 (4th Cir.), cert. denied, 126 S. Ct. 2054 (2006); *United States* v. *Armendariz*, 451 F.3d 352, 358 (5th Cir. 2006); *United States* v. *Davis*, 458 F.3d 491, 496 (6th Cir. 2006), petition for cert. pending, No. 06-7784 (filed Nov. 13, 2006); *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005); *United States* v. *Kendall*, 446 F.3d 782, 785 (8th Cir. 2006); *United States* v. *Bishop*, 469 F.3d 896, 907 (10th Cir. 2006), cert. denied, 127 S. Ct. 2973 (2007); *United States* v. *Crisp*, 454 F.3d 1285, 1291-1292 (11th Cir. 2006); see also *United States* v. *Simpson*, 430 F.3d 1177, 1187 n.10 (D.C. Cir. 2005) (greater explana-

Proportionality review is essential to effectuate the remedial scheme adopted in *Booker*. It also promotes a balanced application of the Section 3553(a) factors, ensures that sentences are sufficient but not greater than necessary to accomplish the purposes of punishment, and verifies that they are supported by sufficiently specific reasons, as required by Section 3553(c). And nothing about proportionality review is inconsistent with the Sixth Amendment, because proportionality review does not require the finding of a fact in order to vary from the advisory Guidelines range. See pp. 34-44, *infra*.

At the outset, it is vital to clear up a misconception (which petitioner fosters) about the nature of proportionality review. Petitioner asserts (Br. 8) that proportionality review requires a court to find "'extraordinary' facts," beyond the verdict or plea, in order to sentence outside the Guidelines range. That statement is incorrect in two critical respects. A court does not need an "extraordinary" justification simply to vary from the range. Section 3353(c) requires a sentencing judge to state "the specific reason for * * * a sentence different from that described" in the Guidelines every time the judge sentences outside the Guidelines range, and that explanation can be reviewed to ensure that inappropriate considerations do not affect the sentence. But modest (or ordinary) deviations from the Guidelines do not require extraordinary justifications. Proportionality review thus does not demand an extraordinary justification for most non-Guidelines sentences. And even when it does demand a substantial justification—such as when a judge imposes probation where the Guidelines call for years of imprisonment—proportionality review does not require extraordinary *facts*. Persuasive policy judgments may satisfy the reviewing court that the variance, although

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tion is required for sentence outside Guidelines range), cert. denied, 547 U.S. 1085 (2006). Cf. *United States* v. *Rattoballi*, 452 F.3d 127, 134 (2d Cir. 2006) (court "ha[s] yet to adopt this standard").

dramatic, is nonetheless reasonable. Consequently, proportionality review is not a "presumption of unreasonableness" for a non-Guidelines sentence going under another name. See Pet. Br. 10-12.[1]

A. Proportionality Review Is Essential To Effectuate The Remedial Scheme Adopted in *Booker*

1. Booker *envisioned that appellate review and the Guidelines would work together to advance the SRA's goal of reducing unwarranted sentencing disparity*

As this Court repeatedly emphasized in *Booker*, Congress's primary goal in enacting the SRA was to reduce the unwarranted disparity that had plagued the previous discre-

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[1] This Court itself so recognized in *Rita* by rejecting a presumption of unreasonableness while reserving (in the same paragraph) the question whether proportionality review is valid. 127 S. Ct. at 2467. Petitioner argues (Br. 10-12) that proportionality review meets the "very definition of a 'presumption'" because (he asserts) it requires appellate courts to assume that outside-range sentences are unreasonable absent "affirmative evidence to the contrary." But assuming "unreasonableness" (which the proportionality principle does not do) is quite different from approaching a sentence significantly outside the advisory range with a question in mind—"Why is this (relatively extreme) sentence reasonable?" That judicial frame of mind does not constitute a "presumption." Rather, it is intrinsic to a practical theory of reasonableness review, in which it would be empirically expected that sentences at or near the margins of a range raise more of a question about their reasonableness (and thus warrant great judicial scrutiny) than sentences in or near the range. Cf. *Rita*, 127 S. Ct. at 2465 (presumption of reasonableness for within-range sentences reflects "real-world circumstance[s]"). And more searching scrutiny for more extreme sentences is intrinsic to any form of substantive reasonableness review, because substantive review inherently presupposes *some* limits on the length of sentences that lack adequate justification. Thus, an appellate court will necessarily give at least some sentences (*e.g.*, those at the extremes of a given range) more searching review than "average" sentences. Nothing in *Rita* suggests that the Court meant to invalidate useful appellate tools that help identify sentences warranting greater scrutiny and structuring the review of outside-range sentences for reasonableness.

tionary sentencing regime. *Booker*, 543 U.S. at 250, 252, 253, 255, 256, 267; *id.* at 292 (Stevens, J., dissenting); see *Rita*, 127 S. Ct. at 2467. The SRA sought to achieve that goal through the combination of mandatory Sentencing Guidelines promulgated by the Sentencing Commission and substantive review of sentences by the courts of appeals. See 18 U.S.C. 3742 (2000 & Supp. IV 2004); 28 U.S.C. 991(b)(1)(B), 994(f); S. Rep. No. 225, 98th Cong., 1st Sess. 65, 151 (1983). In *Booker*, this Court held that the mandatory Guidelines system enacted by the SRA violated the Sixth Amendment. 543 U.S. at 232-235. But the Court attempted to craft a remedy that would permit the SRA to continue to advance Congress's original goal as much as possible, consistent with the Constitution. *Id.* at 247. Indeed, the ability of *Booker*'s remedial scheme to achieve Congress's goals, including uniformity, was essential to the Court's conclusion that its remedial scheme was consistent with well-established principles of statutory construction and severance.

The Court concluded that the SRA would remain constitutional and still reduce unwarranted disparity if the Court severed the provisions that mandated compliance with the Guidelines but left intact the other critical features of the Act. *Booker*, 543 U.S. at 264. The Court identified two features of the SRA that would remain in place and work together "to move sentencing in Congress' preferred direction." *Ibid.* The first was a continued important role for the Sentencing Guidelines. See *id.* at 264-265. The second was the continuation of appellate review, under a reasonableness standard. See *id.* at 260-263. Appellate reasonableness review, together with the advisory Guidelines, would enable the modified SRA to further Congress's goal of increased sentencing uniformity because it would "tend to iron out sentencing differences." *Id.* at 263. The alternative—sentencing without the limits im-

posed by effective appellate review—"would cut the statute loose from its moorings to congressional purpose." *Id.* at 262.

2. *Appellate review cannot limit unwarranted disparity unless it includes proportionality review based on a quantitative benchmark*

As the Court recognized in *Rita*, the appellate review endorsed in *Booker* is substantive. See 127 S. Ct. at 2466-2467; *id.* at 2473 (Stevens, J., concurring). For that substantive review to function as envisioned in *Booker*, it must include proportionality review based on a quantitative benchmark.

Contrary to petitioner's contention (Br. 10), proportionality review does not mean that every non-Guidelines sentence must be supported by "extraordinary circumstances." No court of appeals has held that a district court must provide an extraordinary justification before it can sentence outside the advisory range. Indeed, the courts of appeals have rejected that proposition. See, *e.g.*, *United States* v. *Rivera*, 448 F.3d 82, 85 (1st Cir. 2006). Proportionality review "ask[s] little in the way of explanation for a sentence that varies little from the guidelines." *United States* v. *Poynter*, No. 05-6508, 2007 WL 2127353, at *9 (6th Cir. July 26, 2007). It is thus "unlikely to affect the review of sentences that vary slightly or even moderately from the" advisory range. *Ibid.* "The only time" it has "an effect on the validity of a sentence, is when the trial court varies substantially from the guidelines." *Ibid.*

But appellate review for reasonableness cannot reduce unwarranted disparity unless it includes a mechanism to ensure that sentences at the extremes of the statutory range are reserved for defendants who warrant the most lenient or most severe punishment. Some mechanisms must exist to identify potentially unreasonable sentences and to ensure that sentences that vary dramatically from the norm will not automatically be condemned as unreasonable. If typical defendants

can always receive sentences from probation to the statutory maximum without any means for correction on appeal, then appellate review will, contrary to the promise of *Booker*, fail to move sentencing in the direction of uniformity. And, by the same token, it will fail to promote differentiation in the punishment of those who truly warrant exceptionally lenient or severe sentences. See *United States* v. *Davis*, 458 F.3d 491, 499 (6th Cir. 2006) ("most extreme variance" for defendant who does not deserve the most lenient punishment "leav[es] no room to make reasoned distinctions" between him and other "more worthy defendants"), petition for cert. pending, No. 06-7784 (filed Nov. 13, 2006). To avoid that result, sentences that vary dramatically from the norm must be reserved for cases that present comparably strong justifications.

Courts of appeals cannot identify sentences that vary disproportionately from the norm without an objective and quantitative standard for ascertaining that baseline. Without such a benchmark, appellate courts would be forced in every case to construct anew the range of reasonable sentences for each particular defendant. But "[t]o construct a reasonable sentence starting from scratch in every case would defeat any chance at rough equality which remains a congressional objective." *United States* v. *Jiménez-Beltre*, 440 F.3d 514, 519 (1st Cir. 2006) (en banc), cert. denied, 127 S. Ct. 928 (2007). Thus, proportionality review based on an objective and consistent benchmark is vital if appellate courts are to assess whether sentences reasonably reflect the punishment warranted and to weed out extreme sentences that lack justification.

3. The Sentencing Guidelines provide the only appropriate benchmark for proportionality review

a. The Sentencing Guidelines are the only suitable benchmark for proportionality review. As the Court explained in *Rita*, the Guidelines were formulated, at Congress's direction,

to embody the same Section 3553(a) factors that are applied by sentencing courts. 127 S. Ct. at 2463-2465. The Guidelines thus reflect the expert and reasoned judgment of the Sentencing Commission about how to weigh those factors for particular categories of offenses and offenders. The Commission formulated the Guidelines after taking into account "the aggregate sentencing experiences of individual judges" across the country. *United States* v. *Buchanan*, 449 F.3d 731, 736 (6th Cir. 2006) (Sutton, J., concurring), cert. denied, 127 S. Ct. 3046 (2007); see *Rita*, 127 S. Ct. at 2464. It has continued to revise the Guidelines over the past two decades based on additional "empirical" information, including district court sentencing determinations, appellate decisions reviewing those determinations, and "advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others." *Ibid.* In *Booker*, this Court understood that the Commission would continue to play that role and that the Commission's efforts would promote uniformity in sentencing. 543 U.S. at 264. And Congress has played an active role in shaping the Guidelines. It provided detailed guidance on the contours of the Guidelines in the SRA, and it has reviewed each Guideline before it took effect, rejecting some Guidelines, directing the Commission to modify others, and even enacting some itself. See *Mistretta* v. *United States*, 488 U.S. 361, 377, 393-394 (1989); U.S. Br. at 18, *Rita*, *supra*.

The "result is a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice." *Rita*, 127 S. Ct. at 2464. Thus, "it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives" in the mine run of cases. *Id.* at 2464-2465. Accordingly, the Guidelines provide an appropriate, concrete, and quantitative application of the factors in Section 3553(a) to general catego-

ries of federal offenses and offenders. See *United States* v. *Mykytiuk*, 415 F.3d 606, 607 (7th Cir. 2005).[5]

b. No measure other than the Guidelines can serve as an effective benchmark for proportionality review. The non-Guidelines factors in Section 3553(a) supply a frame of reference, but they are too qualitative and too general to provide an effective benchmark for comparing sentences or identifying undue disparity. The sentencing purposes in Section 3553(a)(2) are only "broad, open-ended goals" that will be applied quite differently by different courts. *Koon* v. *United States*, 518 U.S. 81, 108 (1996); see *United States* v. *Davenport*, 445 F.3d 366, 370 (4th Cir. 2006); *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005). The nature of the offense and characteristics of the defendant, 18 U.S.C. 3553(a)(1), and the "kinds of sentences available," 18 U.S.C. 3553(a)(3), are more concrete, but they cannot be translated into a particular sentence absent a conceptual basis for linking them to the purposes of sentencing in Section 3553(a)(2). Thus, they ultimately supply no more quantitative or consistent a benchmark than the purposes of sentencing themselves. See *Poynter*, 2007 WL 2127353, at *9.

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[5] Petitioner and various amici contend (Pet. Br. 28 n.8; NACDL Br. 16-24; WLF Br. 5-10) that the Guidelines do not adequately account for the Section 3553(a) factors, have not actually reduced sentencing disparities, and often produce sentences that are greater than necessary to satisfy the statutory purposes of sentencing. As explained in the government's brief in *Rita* (at 16-22, 24-32), and in the Sentencing Commission's amicus brief in *Rita* and *Claiborne* v. *United States*, 127 S. Ct. 2245 (2007) (No. 06-5618) (at 17-30), the Guidelines ordinarily represent a reasonable application of the statutory factors and have reduced disparities arising from differences among sentencing judges. Those briefs also refute criticisms raised by petitioner's amici (*e.g.*, NACDL Br. 24-25; WLF Br. 10-23) that the Commission has consistently increased Guidelines ranges and that Guidelines sentences are unduly harsh. See U.S. Br. at 23-24, *Rita*, *supra*; Sentencing Commission Br. at 17-19, *Rita* and *Claiborne*, *supra*.

For the same reasons, the so-called "parsimony" provision, which directs courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth" in Section 3553(a)(2), also cannot provide an objective benchmark for proportionality review. 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). It contains no concrete measure of when a sentence is "sufficient," but simply refers to the highly general and potentially conflicting purposes of sentencing themselves. See *United States* v. *Navedo-Concepción*, 450 F.3d 54, 58 (1st Cir. 2006) (noting that the meaning of the provision "has proved hard to discern").

The mandate in 18 U.S.C. 3553(a)(6) "to avoid unwarranted sentencing disparity" supports use of the Guidelines in a proportionality analysis. No district court or court of appeals, guided solely by its own lights, can singlehandedly reduce the kind of disparity the SRA was intended to address—disparity *nationwide*. See, *e.g.*, *United States* v. *Smith*, 445 F.3d 1, 5 (1st Cir. 2006). Each district court sees only a random and limited portion of federal sentences imposed, even within its own circuit. Although district courts may see many cases that do not reach the courts of appeals, they have little institutional basis for forming a view on how other district courts in other districts, let alone nationwide, sentence similarly situated defendants. And while each court of appeals has a broader view of the types of sentences being imposed, a single circuit cannot effectively consider cases nationwide or establish nationwide standards. Thus, even if appellate courts could formulate a "common law of sentencing" (a highly doubtful proposition under the exceedingly narrow form of appellate review that petitioner and his amici would allow, see Pet. Br. 28; FPCD Br. 15-29), that regional common law could never attain the statutory goal of reducing unwarranted disparity nationally. See *Poynter*, 2007 WL 2127353, at *9, *10.

The Sentencing Commission, in contrast, has the institutional competence to consider sentencing practices on a national basis. It is charged with collecting and analyzing nationwide sentencing data and revising the Guidelines as appropriate. 28 U.S.C. 994(*o*) and (p); 28 U.S.C. 994(w) (Supp. IV 2004); *Rita*, 127 S. Ct. at 2464; *Booker*, 543 U.S. at 263-264. Unlike individual district or appellate courts, the Commission "can view the sentencing process as a whole, developing a broad perspective on sentencing, which will help it produce more consistent sentencing results among similarly situated offenders sentenced by different courts." *United States* v. *Rivera*, 994 F.2d 942, 950 (1st Cir. 1993).

Treating the Guidelines as a benchmark—but not a mandate—therefore provides the only reliable mechanism to reduce disparity on a nationwide basis. When a sentence varies significantly from the Sentencing Commission's expert and empirically grounded assessment of the appropriate sentence, it should prompt an appellate court to seek a substantial justification. That approach permits the courts of appeals to operate from a consistent nationwide starting point so that defendants do not receive inexplicably harsher or more lenient punishment in Des Moines than similarly situated defendants in Chicago or Los Angeles. And it provides the court of appeals with a concrete means of assessing whether the district court's reasoning provides a substantial justification for a sentence far from the norm. In that way, appellate judges in different circuits are able to apply uniform standards in furtherance of the congressional goals of equal treatment and reduced disparity. See *Davis*, 458 F.3d at 495-496.

4. Proportionality review is consistent with the reasonableness review contemplated by Booker

Petitioner contends (Br. 22-29) that proportionality review is inconsistent with the standard of appellate review adopted in *Booker*. That is incorrect.

"*Booker* expressly equated" the reasonableness review that it adopted "with the old abuse-of-discretion standard used to review sentencing departures" before enactment of the PROTECT Act of 2003, Pub. L. No. 108-21, § 401(d)(1), 117 Stat. 670. *Rita*, 127 S. Ct. at 2471 n.2 (Stevens, J., joined by Ginsburg, J., concurring). Under the pre-2003 standard, a sentence was "reasonable" if the "reasons given by the district court" were "sufficient to justify the magnitude of the departure." *Williams* v. *United States*, 503 U.S. 193, 204 (1992). The evaluation of the reasons given in light of the "magnitude" of the departure is the essence of proportionality review. Proportionality review is therefore fully consistent with the standard of review adopted in *Booker*.[6]

Because the model for *Booker*'s reasonableness review included review of the magnitude of departures, petitioner and amicus NACDL are incorrect in arguing (Pet. Br. 24-25;

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[6] The Court noted in *Booker* that a similar reasonableness standard applied to review of sentences imposed following the revocation of supervised release, and it cited several cases as examples. See 543 U.S. at 262. Petitioner erroneously contends (Br. 24) that proportionality review is inconsistent with those cases. None of those cases rejects proportionality review. Moreover, supervised-release revocation cases typically involve narrower statutory ranges and implicate more limited goals, see Sentencing Guidelines Ch. 7, Pt. A(3)(b) (adopting primarily a "breach of trust" rationale). Thus, proportionality review may be of lesser use in that setting. But in initial federal sentencings, courts typically face broad statutory ranges and see a wide array of conduct and offenders. Those cases implicate more complex sentencing purposes and afford courts greater sentencing options. Even if a proportionality principle is not needed in the review of supervised-release-revocation sentences, it is needed for the review of the thousands of initial federal sentences.

NACDL Br. 13) that review of the magnitude of a variance is inconsistent with *Booker*'s excision of 18 U.S.C. 3742(e) (2000 & Supp. IV 2004). One provision in Section 3742(e) called for review of whether "the sentence departs to an unreasonable degree from the applicable guidelines range." 18 U.S.C. 3742(e)(3)(C) (Supp. IV 2004). But *Booker* did not excise Section 3742(e) because of that provision. Nor does the *Booker* remedial opinion require any speculation as to why Section 3742(e) was excised. Instead, *Booker* makes clear that Section 3742(e) required de novo review of a decision to depart and "contains critical cross-references to the (now-excised) § 3553(b)(1) and consequently must be excised." *Booker*, 543 U.S. at 259-261. *Booker* also did not excise Section 3742(f)(2), which like Section 3742(e)(3)(C), calls for the court of appeals to reverse a sentence if it departs from "the applicable guidelines range * * * to an unreasonable degree." 18 U.S.C. 3742(f)(2) (2000 & Supp. IV 2004).[7]

Petitioner and his amici also err in contending that proportionality review does not respect the district court's "institutional advantage" in "assess[ing] the evidence and render[ing] judgment based on the individual circumstances of the case." Pet. Br. 23-26; see FAMM Br. 16-23; NACDL Br. 29. Contrary to that contention, proportionality review does not displace the sentencing court's on-the-scene appraisal of the defendant's crime and its circumstances. Courts of appeals that apply proportionality review continue to defer to the district court's factual findings and case-specific determi-

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[7] Petitioner also incorrectly asserts (Br. 24-25) that review under Section 3742(e)(3)(C) was de novo. Although Section 3742(e), as amended by the PROTECT Act, required de novo review of the decision to depart, it did not require de novo review of the extent of a departure. See 18 U.S.C. 3742(e) (2000 & Supp. IV 2004). The courts of appeals accordingly continued to review the extent of departures for abuse of discretion. See, *e.g.*, *United States* v. *Cooper*, 394 F.3d 172, 176 (3d Cir. 2005) (and cases cited therein).

nations about the offense and offender. See, *e.g.*, *United States* v. *Orozco-Vasquez*, 469 F.3d 1101, 1107 (7th Cir. 2006) (factual findings are reviewed for clear error), cert. denied, 127 S. Ct. 2281 (2007); *United States* v. *Walker*, 447 F.3d 999, 1008 (7th Cir.) ("review is necessarily deferential because the district court is uniquely positioned to determine an appropriate sentence"), cert. denied, 127 S. Ct. 314 (2006).

Petitioner is likewise mistaken in asserting that proportionality review is "essentially *de novo* review" that permits a court of appeals to reverse "solely because [it] would have imposed a different sentence than the district court." Pet. Br. 22; see FPCD Br. 9. Courts of appeals applying proportionality review understand that their review is for abuse of discretion. See, *e.g.*, *United States* v. *Spears*, 469 F.3d 1166, 1170 (8th Cir. 2006) (en banc), petition for cert. pending, No. 06-9864 (filed Mar. 2, 2007); *United States* v. *Reinhart*, 442 F.3d 857, 862 (5th Cir.), cert. denied, 127 S. Ct. 131 (2006). They recognize that imposing sentence is for the district courts, and they do not substitute their own judgment about the appropriate sentence for the district court's judgment. See, *e.g.*, *United States* v. *Jiménez-Gutierrez*, No. 06-1566, 2007 WL 1855644, at *5 (8th Cir. June 29, 2007) ("While we may not agree with the sentencing court's precise determination of the amount by which it decided to vary, the sentencing court, and not this appellate body, holds the discretion in this regard."); *United States* v. *Williams*, 425 F.3d 478, 481 (7th Cir. 2005) ("The question is not how we ourselves would have resolved the factors identified as relevant by section 3553(a) * * * nor what sentence we ourselves ultimately might have decided to impose on the defendant."). The courts of appeals instead review the sentence to determine whether it falls within the range of sentences that is reasonable under the Section 3553(a) factors, in light of the reasons given by the district court. If the district court's explanation logically coheres and

is consistent with the totality of the factors, the appellate court upholds the sentence as reasonable. Conversely, if "the sentencing court relied on improper factors, failed to consider relevant factors, or relied on only proper factors but demonstrated a clear error of judgment in weighing those factors," the court of appeals reverses the sentence as unreasonable. *Jiménez-Gutierrez*, 2007 WL 1855644, at *3. That approach appropriately balances deference to the district court and the normal appellate role of ensuring compliance with the law.[*]

Petitioner also incorrectly argues (Br. 26-27) that proportionality review is inconsistent with the appellate presumption of reasonableness for within-Guidelines sentences upheld in *Rita*. That argument is based on the premise that proportionality review "grant[s] greater deference" to the Sentencing "Commission than to the sentencing judge" and prevents the judge from "independently exercis[ing] its judgment" in imposing sentence. Br. 26. Contrary to that premise, proportionality review neither prevents the sentencing court from making an independent judgment nor subordinates its judgment to the Commission's. Instead, proportionality review simply recognizes that, when the district court's judgment diverges to an extraordinary degree from the Commission's, there is a greater risk that the individual court's judgment

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[*] Petitioner asserts that the "most vivid illustrations" of de novo review are the "*numerous* opinions where the courts of appeals have instructed district courts that they *must* sentence within a particular range on remand." Br. 25 (initial emphasis added). Contrary to that assertion, in less than a handful of cases has a court of appeals set a specific limit on the sentence that the district court may impose on remand. Although the government agrees that a court of appeals should not dictate the sentence that the district court should impose under *Booker*, the fact that some courts of appeals have occasionally set a floor does not establish that they engaged in de novo review. Instead, they simply articulated what they viewed as the lowest *reasonable* sentence under the Section 3553(a) factors in light of the facts and circumstances of the case identified by the district court.

may exceed the range of reasonableness and create unwarranted disparity. Accordingly, consistent with the role of appellate review in reducing disparity, proportionality review subjects the justification for the divergent sentence to greater scrutiny to ensure that the sentence reasonably reflects the Section 3553(a) factors. There is no novelty in varying the degree of scrutiny within the overall context of abuse-of-discretion review when a particular situation or issue calls for that approach. See *Koon*, 518 U.S. at 98.

5. Appellate review without a proportionality principle threatens to restore the virtually unbounded sentencing discretion characteristic of the pre-SRA regime

Petitioner and his amici offer no form of appellate review that holds any promise of fulfilling the critical disparity-curbing role envisioned by *Booker*. Petitioner contends that courts of appeals have no authority to review or disagree with the weight, if any, a district court has given the factors in Section 3553(a). See, *e.g.*, Br. 19 ("[I]t is the sentencing judge, and the sentencing judge alone, who holds the authority to weigh the principles and factors relevant to punishment."). That is not appellate review but its abdication. Courts of appeals cannot carry out this Court's directive to "determin[e] whether [the] sentence 'is unreasonable, having regard for . . . the [Section 3553(a)] factors * * * and . . . the reasons for the imposition of the particular sentence, as stated by the district court,'" *Booker*, 543 U.S. at 261 (emphasis omitted), if they cannot review the weight the district court gave the various Section 3553(a) factors. Nor can appellate review "iron out sentencing differences," *id.* at 263, if it imposes no effective limit on the range of sentences that may be imposed in a particular case.

Petitioner proposes that substantive review be limited to ensuring that "the reasons given by the district court * * *

are not irrational or irrelevant," Br. 27-28, and that the sentence is not so arbitrary and capricious that "no rational judge in the same position could have potentially imposed" it, Br. 23. But if this Court intended review only for rationality, it presumably would have inferred a rationality standard of review, rather than a reasonableness standard of review. The Court recognized it had a relatively free hand to "infer appropriate review standards from related statutory language, the structure of the statute, and the '"sound administration of justice,"'" and it chose reasonableness. 543 U.S. at 260-261 (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 559-560 (1988) (quoting *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985)). Moreover, it is entirely unclear how petitioner's proposed standard of review would reduce disparity, which was a feature of the remedial scheme the *Booker* Court deemed critical. One cannot seriously contend that eliminating only those sentences no *rational* jurist could *potentially* have imposed will iron out sentencing differences, consistent with the goals of the SRA and the remedy adopted in *Booker*. Appellate review for rationality alone would do little to reduce the incidence of sentences that generate unwarranted disparity. Petitioner's proposed standard of review will thus invite the kind of unchecked sentencing discretion that existed in the pre-Guidelines regime and that caused the "shameful disparity in criminal sentences" that Congress sought to eliminate when it enacted the SRA. S. Rep. No. 225, *supra*, at 65.

Petitioner insists that the constricted review he proposes is not "an empty exercise" because "[c]ourts of appeals are still empowered to correct legal error" and to ensure that district courts have complied with "the statutory mandate to consider all relevant factors and determine the sentence that is 'sufficient but not greater th[a]n necessary.'" Br. 27 (quoting *Koon*, 518 U.S. at 98, 108). But petitioner does not explain whether those apparently procedural limitations have any

substantive component. And it is hard to see how they could, if courts of appeals are prohibited from reviewing the district court's application of the Section 3553(a) factors. Petitioner's proposed standard of review thus cannot be squared with this Court's holding in *Rita* that purely procedural review is not enough, and that *Booker* requires substantive review. See *Rita*, 127 S. Ct. at 2466-2467; *id.* at 2473 (Stevens, J., joined by Ginsburg, J., concurring).[9]

B. Proportionality Review Properly Implements The SRA

The proportionality principle also properly implements the SRA. As this Court recognized in crafting the *Booker* remedy, the SRA should be interpreted, to the greatest extent possible consistent with the Constitution, in the manner that best achieves Congress's goal of eliminating unwarranted sentencing disparity. See 543 U.S. at 247, 258-259, 265. Indeed, the degree to which the *Booker* remedial scheme achieved that goal was critical to the Court's acceptance of that regime as consistent with principles of statutory construction and severability and superior to the proposed alternatives. Viewed through that lens, the provisions of the SRA left intact by *Booker* fully support proportionality review.

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[9] The appellate review proposed by amicus FAMM is equally problematic. FAMM would limit review to determining whether the district court imposed the "*least severe* punishment necessary to achieve the specified purposes of the criminal law." FAMM Br. 22. This Court has already rejected that kind of one-way ratchet. See *Booker*, 543 U.S. at 257-258. And FAMM's version could not fulfill the purposes of appellate review envisioned in *Booker* because it does not guard against disparities caused by excessively lenient sentences. FAMM's proposal also rests on misreading the parsimony provision as a direction to be lenient. FAAM Br. 5-15. As explained below, that provision instead mandates that sentences be proportionate to the punishment that is warranted. See pp. 31-32, *infra*.

1. Proportionality review is consistent with Section 3553(a)

Proportionality review, using the Guidelines as a benchmark, promotes a balanced application of the sentencing factors in Section 3553(a). Petitioner does not dispute that proportionality review is consistent with at least three of those factors—Subsections (a)(4) and (5), which call for district courts to consider the Guidelines, and Subsection (a)(6), which requires them to consider avoiding unwarranted disparity. And proportionality review does not ignore the remaining factors—such as the nature of the offense and characteristics of the defendant, 18 U.S.C. 3553(a)(1), the need for the sentence imposed to advance the purposes of punishment, 18 U.S.C. 3553(a)(2), and the kinds of sentences available, 18 U.S.C. 3553(a)(3). Those are the factors that a district court will ordinarily invoke in explaining its reasons for imposing an out-of-Guidelines sentence. And they are the factors that the court of appeals will consider in determining whether the district court's rationale supports its variance from the advisory range. That review does not disregard the non-Guidelines factors. It merely respects the fact that the Commission considered the same factors in formulating the recommended range. "To permit district courts to rely on those factors to vary sentences substantially without asking them to give commensurate explanations is not to respect [those factors] but to exalt them—and in the process to make the avoidance of unwarranted sentencing disparities all but impossible." *Poynter*, 2007 WL 2127353, at *9.

Petitioner contends that proportionality review is inconsistent with Section 3553(a) because it "effectively forces the district court to give greater weight to a single factor—the range recommended by the Guidelines—than to all of the other factors and purposes listed in § 3553(a)." Br. 20. As just discussed, however, proportionality review does not force

the district court to give greater weight to the Guidelines range. Instead, it encourages the court to balance all the Section 3553(a) factors. At the same time, it provides an appropriate means for the court of appeals to review the reasonableness of the balance struck by the district court, particularly where a dramatic divergence from the balance struck by the Sentencing Commission suggests a heightened risk that the sentence may be unreasonable. Thus, nothing in proportionality review is inconsistent with the fact that Section 3553(a) "contains no hierarchy of factors." Br. 19.

Petitioner's argument that proportionality review conflicts with Section 3553(a) is based on the mistaken premise that "it is the sentencing judge, and the sentencing judge alone, who holds the authority" to weigh the Section 3553(a) factors. Br. 19. Nothing in the SRA suggests that the sentencing court has plenary and exclusive authority to weigh those factors. And, as discussed above, reading the SRA to give sentencing courts that authority would frustrate both the purpose of the Act and the role envisioned for appellate review in *Booker*. If each sentencing judge had limitless discretion to weigh the Section 3553(a) factors as the judge saw fit, there could be no hope that appellate review would further the SRA's goal of reducing sentencing disparity In contrast, proportionality review advances that goal by requiring greater scrutiny of the district courts' application of the Section 3553(a) factors in cases in which those courts have imposed sentences far outside the customary range.

2. Proportionality review is consistent with the "parsimony" provision

Proportionality review also helps to implement the "parsimony" provision—Section 3553(a)'s mandate that the district court "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment set out in

Section 3553(a)(2). 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). That provision commands district courts to impose sentences that are proportionate to the punishment that is warranted—"sufficient" but "not greater than necessary." There is no better way to protect against excessively lenient or severe sentences than to require substantial justifications for sentences that diverge to an extraordinary degree from the norm. See *Poynter*, 2007 WL 2127353, at *10.

Petitioner contends (Br. 20-22) that proportionality review conflicts with the parsimony provision because it prevents a district court from sentencing outside the Guidelines range unless the facts of the case are extraordinary. Contrary to that contention, proportionality review does not require an extraordinary justification for all out-of-Guidelines sentences; most sentences can be justified as reasonable based on a relatively straightforward explanation, as is required in any event by Section 3553(c). And variances need not be justified solely on *factual* grounds but may, subject to appellate review, be based on reasoned policy considerations. See pp. 35-36, *infra*.

3. Proportionality review is supported by 18 U.S.C. 3553(c)

Proportionality review is also consistent with 18 U.S.C. 3553(c) (2000 & Supp. IV 2004). Section 3553(c) requires a district court to state reasons for the sentence that it imposes, and Section 3553(c)(2) requires more specific reasons for a sentence outside the Guidelines range. For a non-Guidelines sentence, the court must state "the specific reason for the imposition of a sentence different from" the Guidelines recommendation, and that reason must generally be "stated with specificity in the written order of judgment and commitment." 18 U.S.C. 3553(c)(2) (Supp. IV 2004). *Booker* did not excise that provision, see 543 U.S. at 260, which is directed in part towards facilitating appellate review, see S. Rep. No. 225,

supra, at 80. See also *Rita*, 127 S. Ct. at 2468 (discussing the relevance of the statement of reasons for appellate review and noting that requiring a statement of specific reasons for a non-Guidelines sentence presents no Sixth Amendment problem).

The requirement in Section 3553(c)(2) that the district court explain why the sentence diverges from the Guidelines range provides practical and legal support for proportionality review. The Guidelines provide national standards that judges must "take * * * into account when sentencing" (*Booker*, 543 U.S. at 264), and the requirement that they provide specific reasons for not imposing a Guidelines sentence both assists and justifies closer scrutiny of sentences that vary substantially from the Guidelines range.

As the Court noted in *Rita*, Section 3553(c) also facilitates the evolution of the Guidelines in response to district court sentencing decisions. 127 S. Ct. at 2469. Amicus FPCD (Br. 3-29) argues that the proportionality principle stifles that evolution. On the contrary, proportionality review actually facilitates the evolution of the Guidelines, in much the same way as Section 3553(c)(2). The proportionality principle provides district courts with an incentive to explain fully (and with specific reference to the Guidelines) their reasons for imposing sentences that vary dramatically from the Guidelines range. Those explanations will provide the Commission with detailed information about potential problems with the Guidelines and thus "help the Guidelines constructively evolve over time." *Rita*, 127 S. Ct. at 2469. In contrast, the absolute deference to district court decisionmaking advocated by petitioner and FPCD would not promote the evolution of the Guidelines, because district courts would have little reason to provide more than the minimum explanation required by Section 3553(c). Moreover, if absolute deference were required, appellate courts would be unlikely to analyze in any detail the

reasons that district courts provide for variances—analysis that is also beneficial to Guidelines development. See *Booker*, 546 U.S. at 263. Thus, proportionality review works together with Section 3553(c) to promote the evolution of the Guidelines, as contemplated by the SRA and *Booker*.

C. Proportionality Review Is Consistent With The Sixth Amendment

1. Proportionality review does not violate the Sixth Amendment because it does not require the sentencing judge to find a fact to sentence outside the advisory Guidelines range

Petitioner and various amici (Pet. Br. 12-19; FCPD Br. 13-14; FAMM Br. 25-29; NACDL Br. 3, 5-11) contend that proportionality review violates the Sixth Amendment. Their arguments, however, are all based on the incorrect premise that the proportionality principle "forbids district courts from sentencing outside the Guidelines absent additional findings of fact." Pet. Br. 12; see FCPD Br. 13; FAMM Br. 26; NACDL Br. 5. Contrary to that premise, proportionality review does not require the sentencing judge to make any "additional findings of fact" in order to justify an out-of-Guidelines sentence, even one that varies to an extraordinary degree from the Guidelines range. Proportionality review therefore does not violate the Sixth Amendment.

a. As this Court has repeatedly made clear, the Sixth Amendment is not implicated when a judge exercises discretion "in imposing a sentence within a statutory range." *Booker*, 543 U.S. at 233 (citing *Apprendi* v. *New Jersey*, 530 U.S. 466, 481 (2000), and *Williams* v. *New York*, 337 U.S. 241, 246 (1949)); see *Rita*, 127 S. Ct. at 2466; *Cunningham* v. *California*, 127 S. Ct. 856, 866 (2007). "For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determina-

tion of the facts that the judge deems relevant." *Booker*, 543 U.S. at 233. The Court concluded, however, that the Sixth Amendment is violated if a judge may lawfully sentence outside a specified sentencing range only if the judge finds a fact beyond the "facts reflected in the jury verdict or admitted by the defendant." *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (emphasis omitted); see *Rita*, 127 S. Ct. at 2466; *Cunningham*, 127 S. Ct. at 870. Thus, a guidelines system presents a Sixth Amendment problem only when it mandates some range, lower than the maximum for an offense specified by statute, that the judge may not lawfully exceed without finding a fact in addition to the facts found by the jury or admitted by the defendant.

The SRA, as it existed before *Booker*, presented that Sixth Amendment problem. See *Booker*, 543 U.S. at 233-235. To render the SRA constitutional, *Booker* made the Guidelines advisory by excising Section 3553(b)(1)'s limitation on the district court's authority to sentence outside the range. 543 U.S. at 259; see *Rita*, 127 S. Ct. at 2456. The proportionality principle does not reinstate that limitation: it does not require the judge to find an aggravating or mitigating fact that the Guidelines do not take into account. Nor, contrary to petitioner's argument (Br. 12), does it otherwise require the sentencing judge to find facts beyond those found by the jury or admitted by the defendant in order to sentence outside the Guidelines, even when the sentence varies to an extraordinary degree from the advisory range. Rather, a variance may be justified either by atypical facts, by persuasive policy reasons for concluding that the Guidelines do not appropriately reflect Section 3553(a)'s sentencing factors, or by a combination of facts and policy considerations. When a district court fails to provide an adequate justification for a sentence that varies to an extraordinary degree from the Guidelines range, "[w]hat is missing * * * is additional reasoning, not additional

factfinding." *Poynter*, 2007 WL 2127353, at *10. And "an ordinary explanation of judicial reasons as to why the judge has, or has not, applied the Guidelines triggers no Sixth Amendment 'jury trial' requirement." *Rita*, 127 S. Ct. at 2468.[10]

Under this Court's decisions, a court's ability to vary based solely on policy disagreements with the Guidelines avoids Sixth Amendment difficulties that would arise if judges were effectively required to find facts beyond those found by the jury or admitted by the defendant in order to sentence above the Guidelines range. Accordingly, this Court noted in *Rita* that the parties may argue at sentencing "that the Guidelines sentence should not apply * * * because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations," 127 S. Ct. at 2465; may "contest[] the Guidelines sentence generally under § 3553(a)," *id.* at 2648; and may "argue[] that the Guidelines reflect an unsound judgment," *ibid.* Moreover, "[a]s far as the law is concerned, the judge could disregard the Guidelines" and impose the sentence the Guidelines would recommend for a case with special aggravating facts even "in the absence of the special facts." *Id.* at 2466. Thus, an extraordinary variance, like any other vari-

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[10] Some courts have indicated that the justification for an extraordinary variance must be fact-based. See Pet. Br. 16 (citing cases). Those statements, however, do not reflect a requirement inherent in proportionality review itself. Instead, they reflect an independent proposition that has also been adopted by a majority of the courts of appeals—that district courts may not vary from the Guidelines based on a reasoned disagreement with Sentencing Commission policy. See, *e.g.*, *United States* v. *Borho*, 485 F.3d 904, 911 (6th Cir. 2007); *United States* v. *Trupiu*, 475 F.3d 71, 76 (2d Cir. 2007), petition for cert. pending, No. 06-12034 (filed June 22, 2007). As discussed in the text, to the extent that those holdings require the sentencing court to find a *fact* to vary from the Guidelines range, they may create Sixth Amendment difficulties. But that is not a reason to reject the proportionality principle, which *is* fully consistent with this Court's Sixth Amendment jurisprudence.

ance, may be justified without the sentencing judge finding "special facts."[11]

Moreover, it must be acknowledged that petitioner's Sixth Amendment argument is less an attack on the proportionality principle than an attack on any meaningful form of appellate reasonableness review. Any system of substantive reasonableness review will result in some holdings that the reasons given in a particular case do not support the sentence imposed. Accordingly, petitioner's Sixth Amendment argument must be understood as an attack on *Booker*'s remedial holding and its inference of a reasonableness standard of review. But *Booker*'s remedial holding does not violate its Sixth Amendment holding. A majority of the Court held as much in

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[11] Although sentencing courts may impose non-Guidelines sentences based on policy disagreements with the Sentencing Commission, courts may not vary from the Guidelines under Section 3553(a) based on disagreements with policy choices mandated by Congress. See U.S. Br., *Kimbrough* v. *United States*, No. 06-6330. In addition, policy-based variances remain subject to proportionality review. Thus, the extent of the variance justified by a policy disagreement will depend on the persuasiveness of the district court's specific, articulated support for the disagreement. In evaluating the extent of the variance justified by a policy disagreement, a court of appeals should take into account that policy-based variances pose a greater risk of generating broad sentencing disparity than variances based on case-specific facts. A reviewing court should also recognize that district courts do not have the "institutional advantage" in making policy decisions that they have in assessing the application of the Section 3553(a) factors to the facts of a particular case. *Koon*, 518 U.S. at 98. District courts are far less well positioned than the Commission to marshal and evaluate the extensive and complex data necessary to make broad policy judgments, particularly about the culpability levels associated with categories of crimes or conduct. See *Rita*, 127 S. Ct. at 2463 (noting that the Commission operates at the "wholesale" level and district courts operate at the "retail" level). Accordingly, a policy-based variance is not entitled to as much deference as a fact-based variance. See *Koon*, 518 U.S. at 98 ("The deference that is due depends on the nature of the question presented.").

Booker, and the Court reaffirmed the point in *Rita*. See 127 S. Ct. at 2466-2467.

b. Petitioner asserts that "[n]o reported decision has upheld a non-Guidelines sentence" under the proportionality principle "based solely on the facts found by the jury." Br. 16. That may be true, but it is not problematic. Because sentencing under the advisory Guidelines (like traditional sentencing) routinely involves judicial factfinding, courts of appeals will rarely (if ever) review a case in which the district court has attempted to justify a variance based only on the facts reflected in the verdict or guilty plea. That presents no constitutional concern, however, because "[t]his Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." *Rita*, 127 S. Ct. at 2465-2466. What would present a constitutional concern is a decision holding that, under the proportionality principle (or any other variant of reasonableness review), a non-Guidelines sentence *must be reversed* unless the sentencing court has found a fact in addition to those found by the jury. The government is not aware of any court of appeals decision that has so held, and any such decision would reflect a mistaken interpretation of proportionality review.

Petitioner and amicus NACDL also argue that proportionality review necessarily requires additional factfinding because "[t]he only means by which a judge can determine that a case is somehow different from the run of the mine—i.e., 'extraordinary'—is through additional findings of fact." Pet. Br. 17; see NACDL Br. 9. But proportionality review does not inherently require a judge to find that a case is "different from the run of the mine" in order to vary. An extraordinary justification is required only for a sentence that varies dramatically from the Guidelines range, and, even then, the justi-

fication can be based on policy considerations, rather than on specific findings of fact.

2. The Sixth Amendment does not require that a sentence at the statutory maximum be a reasonable one in every case

NACDL observes (Br. 9) that, under proportionality review, a sentence at the statutory maximum will not be reasonable in every case. Indeed, a sentence at the maximum will not be reasonable in a significant number of cases. (The same is true of a sentence at the minimum.) But that is not a consequence of proportionality review in particular. Rather, it is inherent in *any form* of substantive reasonableness review. See *Rita*, 127 S. Ct. at 2477 (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment); *Cunningham*, 127 S. Ct. at 876 (Alito, J., dissenting, joined by Kennedy & Breyer, JJ., dissenting). And this Court has correctly held that substantive reasonableness review is nonetheless consistent with the Sixth Amendment. See *Rita*, 127 S. Ct. at 2466-2467; *id.* at 2473 (Stevens, J., concurring).[12]

In any system under which judges sentence rationally within a statutory range, a sentence at the statutory maximum will be unavailable in a significant number of cases. When Congress enacts a broad sentencing range, it necessarily contemplates punishment alternatives for the full spectrum of offenders. Sentencing judges are expected to reserve the harshest punishment for the most culpable offenders and the most lenient punishment for the least culpable—and to

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[12] The Court has left open the question whether "some future unusually harsh sentence" could present a case-specific Sixth Amendment problem. *Rita*, 127 S. Ct. at 2473. So long as the judge's legal discretion extends to the maximum established in the United States Code, however, any such as-applied Sixth Amendment challenge must fail. In any event, this case does not present that question.

graduate punishment for offenders that fall in between those extremes. Imposing the most severe sentence on *all* defendants would conflict with Congress's provision of a range. See, *e.g.*, *Poynter*, 2007 WL 2127353, at *6 (explaining that "not all repeat sex offenders deserve what amounts to a life sentence; otherwise, Congress would not have set a statutory range of 0-60 years").

For that reason, even before the SRA, appellate courts would reverse a sentence at the statutory maximum when the sentencing judge had failed to exercise discretion in light of the circumstances of the individual offender, but had instead imposed the most severe sentence available based solely on the offense of conviction. See, *e.g.*, *United States* v. *Bowser*, 497 F.2d 1017, 1019 (4th Cir.), cert. denied, 419 U.S. 857 (1974); *United States* v. *Daniels*, 446 F.2d 967, 971 (6th Cir. 1971); *Woosley* v. *United States*, 478 F.2d 139, 143 (8th Cir. 1973); *United States* v. *Barker*, 771 F.2d 1362, 1367 (9th Cir. 1985); *United States* v. *McCoy*, 429 F.2d 739, 743 (D.C. Cir. 1970) (per curiam); cf. *United States* v. *Roper*, 681 F.2d 1354, 1361 (11th Cir. 1982). Those courts recognized that, when Congress establishes a punishment range, it intends sentencing courts to take into account individualized circumstances rather than routinely to impose the maximum sentence. See *Barker*, 771 F.2d at 1367; *Daniels*, 446 F.2d at 971-972. Nothing in that principle raised any Sixth Amendment concern. Reasonableness review using a proportionality principle that has the same consequence is therefore also consistent with the Sixth Amendment.

This Court's *Apprendi* line of cases does not require a different conclusion. The existence of an appellate check on a sentencing court's authority to sentence at the maximum (absent a sufficient reason) does not create an identifiable lesser punishment that the court cannot lawfully exceed without engaging in judicial factfinding. And unless there is such

an identifiable lower limit to the lawfully available punishment, the *Apprendi* principle is not violated. See *Blakely*, 542 U.S. at 307 (*Apprendi* is triggered when there is "a lesser sentence" to which "the defendant has a legal *right*" absent some factual finding); *Harris* v. *United States*, 536 U.S. 545, 566 (2002) (plurality opinion) ("The Fifth and Sixth Amendments ensure that the defendant 'will never get *more* punishment than he bargained for when he did the crime.'") (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)); *Apprendi*, 530 U.S. at 489 ("[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the *prescribed range of penalties* to which a criminal defendant is exposed.") (emphasis added; citation omitted; brackets in original); *Rita*, 127 S. Ct. at 2466.

Reasonableness review using a proportionality principle does not create an ascertainable lower limit on the legally available punishment. It is not possible for a defendant to anticipate in any case the particular combination of facts and policy judgments on which the sentencing court may rely in determining the appropriate sentence. Nor is it possible to predict the maximum sentence that an appellate court might ultimately conclude is reasonable based on those fact- and policy-based justifications. Even when a court of appeals vacates a sentence as unreasonable and remands for resentencing, its ruling need not set a maximum sentence. An appellate court cannot anticipate all of the relevant facts and policy considerations that the district court on remand (or a future district court facing a similar case) could consider in conducting its Section 3553(a) analysis. Thus, proportionality review does not offend the Sixth Amendment.

3. *Proportionality review does not restore mandatory guidelines or otherwise unconstitutionally constrain district courts' sentencing discretion*

Amicus FPCD incorrectly contends (Br. 13-14) that the proportionality principle "effectively restores mandatory Guidelines" because it discourages district courts from imposing non-Guidelines sentences. This Court rejected a similar challenge to the appellate presumption of reasonableness for within-Guidelines sentences in *Rita*. The Court stated that the fact that "the presumption will encourage sentencing judges to impose Guidelines sentences" does not "change the constitutional calculus." *Rita*, 127 S. Ct. at 2467. That statement applies with equal force to proportionality review.[13]

In any event, FPCD's contention lacks factual support. The percentage of non-Guidelines sentences has increased significantly since *Booker* in virtually all circuits, including all but one that have adopted the proportionality principle. In the four fiscal years before this Court's decision in *Blakely*, available statistics indicate that district courts imposed non-Guidelines sentences on grounds other than government-sponsored departure in 9.4% of the cases. See App., *infra*, 31a. Between February 1, 2005 (a few weeks after *Booker* was decided), and March 31, 2007 (the latest date for which preliminary data are available), district courts imposed such sentences in 13.9% of the cases. *Ibid.* That represents a

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[13] For the same reason, FPCD errs in asserting (Br. 13-14) that it is problematic that proportionality circuits reverse a higher percentage of non-Guidelines sentences than other circuits. That fact simply indicates that the proportionality principle enables appellate review to further the SRA's goals of reducing unwarranted disparity and increasing sentencing uniformity. "The fact that [proportionality review] might help achieve these congressional goals does not provide cause for holding [it] unlawful as long as [it] remains constitutional." *Rita*, 127 S. Ct. at 2467. And, as discussed above, proportionality review is constitutional.

48.6% increase in the rate of out-of-Guidelines sentences. Moreover, non-Guidelines sentences have, on average, increased at a significantly greater rate in circuits that have adopted the proportionality principle than in circuits that have not adopted the principle. *Ibid.* The rate of increase is 71.3% in proportionality circuits and only 20.6% in other circuits. *Ibid.* Thus, sentencing data provides no sound basis for concluding that proportionality review discourages out-of-Guidelines sentences (although it may discourage excessive variances and encourage thoroughly reasoned variances).

NYCDL contends (Br. 2-3, 5-8) that the proportionality principle leads courts of appeals to invalidate most below-Guidelines sentences and to affirm most above-Guidelines sentences. That claim has no logical basis because the proportionality principle applies equally to sentences whether they are above or below the Guidelines range. See, *e.g.*, *Dean*, 414 F.3d at 729 ("[T]he farther the judge's sentence departs from the guidelines sentence (in either direction—that of greater severity, or that of greater lenity), the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed.").

The difference in the rates of affirmance for below- and above-Guidelines sentences stems from other factors that provide no cause for concern. Upward variances are far rarer than downward ones. See United States Sentencing Commission, *Final Report on the Impact of* United States *v.* Booker *on Federal Sentencing* App. D-4 (2006) <http://www.ussc.gov/booker_report.pdf>; App., *infra*, 31a. And the government appeals a small percentage of sentences (less than 3%) on the ground of unreasonableness, while criminal defendants appeal

a high percentage (probably nearly all upward variances).[14] Both FPCD and NYCDL report more than 17 times as many defendant appeals as government appeals, see FPCD Br. at A8, *Rita*, *supra*, and *Claiborne* v. *United States*, 127 S. Ct. 2245 (2007) (No. 06-5618); NYCDL Br. App. 4a-6a, despite the fact that, since *Booker*, district courts have imposed below-Guidelines sentences almost eight times as often as above-Guidelines sentences, see App., *infra*, 31a. Indeed, FPCD figures show that defendants are nearly twice as likely to appeal even when their sentence is below the Guidelines range. FPCD Br. at A8, *Rita* and *Claiborne*, *supra* (counting 148 defendant appeals and 83 government appeals from below-Guidelines sentences). See also *United States* v. *McDonald*, 461 F.3d 948, 956 n.7 (8th Cir. 2006). Given the government's greater selectivity in appealing, it is unsurprising that appellate courts have reversed below-range sentences more frequently.

II. PETITIONER'S SENTENCE WAS UNREASONABLE

Petitioner's advisory Guidelines range was 30 to 37 months of imprisonment. J.A. 96. The district court did not impose any prison term, but instead sentenced petitioner to three years of probation. J.A. 99. That was an extraordinary variance, and under the proportionality principle, it required a correspondingly strong justification. The justification provided by the district court cannot reasonably be viewed as strong enough to justify the elimination of all prison time for a serious drug offense. The sentence was therefore unreasonable.[15]

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[14] Of the more than 150,000 federal sentences issued since *Booker*, see App., *infra*, 31a, the government has appealed fewer than 400.

[15] The court of appeals concluded that the variance was extraordinary because there is a 100% difference between some imprisonment and no imprisonment. J.A. 137. Amici WLF (Br. 23-25) and NYCDL (Br. 9, 16) criticize the

The district court identified five considerations as justifying the sentence: (1) petitioner's withdrawal from the conspiracy; (2) his "exemplary behavior while on bond"; (3) the support he received from family and friends; (4) his lack of a substantial criminal history, particularly a violent one; and (5) his "immaturity." J.A. 97. Those factors were appropriate considerations under Section 3553(a)(1), and the district court could reasonably have relied on them to impose a sentence below the Guidelines range. For several reasons, however, the court acted unreasonably in relying on them to impose a sentence of probation—the most lenient sentence available.

For reasonableness review to promote Congress's goal of avoiding unwarranted disparity, sentences at the top and bottom of the statutory range should generally be reserved for cases that warrant the most severe or most lenient punishment. See *Poynter*, 2007 WL 2127353, at *7 (reasoning that "the only way to 'avoid unwarranted sentencing disparities' is for appellate courts to preserve reasoned distinctions among offenders") (citation omitted). Just as the aggravating features of this case—petitioner's protracted distribution of a dangerous drug, from which he reaped tens of thousands of dollars in profits—would not reasonably justify a sentence

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court's focus on percentage alone as mechanical and argue that it unduly disfavors probationary sentences. The government agrees that appellate courts should not focus solely on the percentage deviation from the Guidelines range but should consider all relevant measures of the extent of a variance—including percentage, absolute time, and any difference in the nature of the punishment. See U.S. Br. at 29, *Claiborne*, *supra*. Even under that approach, however, the court of appeals was clearly correct in concluding that the variance in this case was extraordinary. Three years of probation represents dramatically less punishment than two-and-a-half years of imprisonment. The probationary term involves no incarceration at all, compared to 30 months of prison confinement. Moreover, a prison term would have triggered a minimum of three years of supervised release, which would have involved restrictions on petitioner's liberty equivalent to those entailed by probation. See p. 49, *infra*.

dramatically above the Guidelines range or at the statutory maximum of 20 years of imprisonment, the factors invoked by the district court cannot reasonably be viewed as justifying a sentence far below the advisory Guidelines range and at the bottom of the statutory range, particularly considering the seriousness of petitioner's offense and the need to deter other potential offenders.

The district court gave unreasonable weight to petitioner's withdrawal from the conspiracy. That action, although commendable, was motivated not by remorse but by a desire to avoid apprehension and punishment. Petitioner told Rinderknecht that he no longer wanted to be involved in the drug distribution business because he was nervous that Sauerberg was telling too many people about it. J.A. 131. Moreover, petitioner did not go to the police or take any other action to stop the distribution operation from continuing.

Petitioner's criminal history likewise cannot reasonably justify the extraordinarily lenient sentence he received. His criminal history was reflected in his Guidelines range. His relatively minor criminal record placed him in criminal history category I, see J.A. 132, and resulted in a two-level reduction in his offense level under the safety-valve provision, *ibid.*; see pp. 4-5 & n.2, *supra*. The fact that the Guidelines already reflect the defendant's criminal history does not bar a sentencing court from relying on criminal history to justify a variance in an appropriate case. Here, however, the court did not explain why petitioner's criminal record justified an extraordinarily lenient sentence. Nor does anything apparent in the record suggest that petitioner was less culpable than other offenders in the lowest criminal history category. On the contrary, petitioner was not a first-time offender but had two prior convictions, including one that was not reflected in his criminal history score, and a prior drug charge for which he received a deferred judgment. See J.A. 132.

In addition, the district court placed too much reliance on general studies showing that young people are more likely to engage in "risky behavior," J.A. 98, and on research in brain development, J.A. 97-98. The district court did not explain how those studies related to petitioner's criminal acts, and their relevance is not apparent. See *ibid.* Far from being "impetuous and ill-considered," J.A. 98, petitioner's conduct evinced a well-planned course of action by a college student who was capable of orchestrating significant business activities. In particular, after conferring with his co-conspirators, petitioner decided to take on a larger role in the conspiracy, and he withdrew from the conspiracy only after making a significant amount of money. J.A. 130-131.

As the court of appeals explained, the district court also failed to give sufficient weight to the seriousness of petitioner's offense. See J.A. 138-139; 18 U.S.C. 3553(a)(2)(A). Petitioner played a major role in a conspiracy to distribute an extremely dangerous drug. He served as a mid-level manager, obtained thousands of tablets of ecstasy that he distributed to his contacts for further distribution, and earned profits of $30,000 to $40,000 over a seven-month period. See J.A. 24-25, 130-131, 146-152. Congress and the Sentencing Commission have recognized the dangers associated with the distribution of ecstasy, including "the rapidly growing incidence of abuse[,] * * * the threat to public safety that such abuse poses," and the fact that the drug is "frequently marketed to youth." Ecstasy Anti-Proliferation Act of 2000, Pub. L. No. 106-310, § 3663(c)(2), 114 Stat. 1243; see United States Sentencing Commission, *Report to the Congress: MDMA Drug Offenses* 4-5, 10-16 (2001) <http://www.ussc.gov/r_ congress/mdma_final2.pdf> (Sentencing Commission Report) (reviewing harms from ecstasy and concluding that it ranks in seriousness between powder cocaine and heroin).

In 2000, the year that petitioner engaged in the ecstasy distribution conspiracy, Congress directed the Sentencing Commission to amend the Guidelines "to provide for increased penalties * * * that * * * reflect the seriousness of [ecstasy distribution] offenses and the need to deter them." Ecstasy Anti-Proliferation Act of 2000, Pub. L. No. 106-310, § 3663(b)(1), 114 Stat. 1243. In response to that directive, the Commission amended the Guidelines' drug conversion ratio so that one gram of MDMA, which had been treated as equivalent to 35 grams of marijuana, is now treated as equivalent to 500 grams of marijuana. Sentencing Guidelines § 2D1.1, comment. (n.10) (drug equivalency tables); see *id.* App. C, amends. 609, 621 (effective May 1, 2001, and Nov. 1, 2001). Under the amended Guidelines, petitioner would have been responsible for the equivalent of 1250 kilograms of marijuana, and his Guidelines range would have been 70 to 87 months of imprisonment. See J.A. 131-132, 138; Sentencing Guidelines Ch. 5, Pt. A (Sentenceing Table); see also Sentencing Commission Report 6 (middle-level distributors should generally receive ten-year sentences).[16]

Petitioner is thus far off the mark in contending that his probationary sentence was "wholly appropriate." Pet. Br. 33-34; see NYCDL Br. 9-21. Congress has recognized that a "sentence other than imprisonment" may be appropriate for

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[16] The amended Guideline was not applied to petitioner, and the government has taken the position that the Ex Post Facto Clause bars the retroactive application of severity-enhancing Guidelines even in the advisory system installed by *Booker*—a conclusion that depends in no small part on the significant role of the Guidelines in proportionality analysis on appellate review. See U.S. Br. in Opp., *Demaree* v. *United States*, No. 06-8377. But see *United States* v. *Demaree*, 459 F.3d 791, 794-795 (7th Cir. 2006) (holding that the Ex Post Facto Clause does not apply to advisory guidelines), cert. denied, 127 S. Ct. 3055 (2007). Even if the new MDMA Guideline may not be applied to petitioner, however, it nevertheless evinces a congressional policy that courts can consider under *Booker* in assessing the relative severity of an offense.

a "first offender who has not been convicted of a crime of violence or an otherwise serious offense," 28 U.S.C. 994(j), but it has also made clear that trafficking in a "substantial quantity of a controlled substance" is a serious offense that warrants a "substantial term of imprisonment," 28 U.S.C. 994(i)(5). Moreover, while three years of probation is not "zero punishment," NYCDL Br. 3, 9, it cannot reasonably be deemed to be "harsher than a short period of incarceration," as NYCDL suggests (*id.* at 16). Although probation imposed some "limitations on [petitioner's] freedom of movement and conduct," Pet. Br. 33, even a relatively brief sentence of imprisonment would have been followed by at least three years of supervised release, 21 U.S.C. 841(b)(1)(C), subject to the same limitations on his freedom. See 18 U.S.C. 3583(d); see also *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 542 (1989) (Probation "may engender 'a significant infringement of personal freedom,'" but "cannot approximate in severity the loss of liberty that a prison term entails.") (citation omitted). Petitioner's sentence was wholly inconsistent with the seriousness of his offense.

Furthermore, the district court gave no weight to the need for petitioner's sentence to "afford adequate deterrence to criminal conduct." 18 U.S.C. 3553(a)(2)(B). Even when a sentencing court perceives little need to deter the defendant before it, it cannot disregard the need to "afford adequate deterrence" to criminal conduct by others. Petitioner's sentence is unlikely to deter others who might be inclined to traffic in illegal drugs. On the contrary, it sends a message that an individual who plays a major role in a drug distribution conspiracy, and who ceases his criminal conduct only when the risk of detection becomes too great, faces at most a brief period of probation. Given the powerful financial incentive of "easy money" that petitioner's offense presented (J.A. 124 n.3), probation provides inadequate general deterrence for

that very serious crime. The district court's "failure to account for that important objective deprives [petitioner's] extraordinarily lenient sentence of the 'compelling justification' required to render it reasonable." *United States* v. *Duhon*, 440 F.3d 711, 721 (5th Cir. 2006) (Garza, J., concurring), petition for cert. pending, No. 05-11144 (filed May 18, 2006).

Finally, petitioner's lenient sentence illustrates the potential for wide disparity between similarly situated defendants. Most drug defendants who appear for federal sentencing will not obtain probation. Petitioner was able to make a case for probation in part because of socioeconomic advantages that hardly mitigate his crime. Petitioner was a college student who had many choices other than to engage in drug trafficking, yet he did so anyway. When he feared discovery, he ceased his criminal activity, but kept his illicit proceeds (giving him the opportunity to invest them in other endeavors). By the time he came to federal sentencing, his advantages in life enabled him to present himself as a college graduate and owner of a thriving small business who had turned his life around, *e.g.*, J.A. 94-95, in contrast to the many defendants who lack the financial resources, family support, and education to take those steps. No doubt those favorable equities could support a below-range sentence. But the no-imprisonment sentence in this case impairs the SRA's cardinal goal of avoiding unwarranted disparities among defendants who have committed similar crimes and have similar records. See 18 U.S.C. 3553(a)(6).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. Section 3553 of Title 18 (2000 & Supp. IV 2004) provides:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742 (g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to

be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—

(1) In General—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only

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[1] So in original. The period probably should be a semicolon.

the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses—

(A)[2] **Sentencing**—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

> (i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;
>
> (ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—
>
> > (I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a)

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[2] So in original. No subpart (B) has been enacted.

of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the courts statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice pursuant to sec-

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[3] So in original. The second comma probably should not appear.

tion 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendants substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or

406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determina-

tion by the court that the defendant has complied with this requirement.

3. Section 3742 of Title 18 (2000 & Supp. IV 2004) provides:

Review of a sentence

(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) PLEA AGREEMENTS.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) RECORD ON REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular

sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) DECISION AND DISPOSITION.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) SENTENCING UPON REMAND.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) APPLICATION TO A SENTENCE BY A MAGISTRATE JUDGE.—An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) GUIDELINE NOT EXPRESSED AS A RANGE.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) DEFINITIONS.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

4. Section 991 of Title 28 (2000 & Supp. IV 2004) provides:

United States Sentencing Commission; establishment and purposes

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. Not more than 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney Generals designee, shall be an ex officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

5. Section 994 of Title 28 (2000 & Supp. IV 2004) provides:

Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanc-

tions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents[1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of

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[1] So in original. Probably should be "incidence."

probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents[2] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

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[2] So in original. Probably should be "incidence."

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the

maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and Chapter 705 of Title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and Chapter 705 of Title 46.

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or

vocational training, medical care, or other correctional treatment.

(*l*) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the

Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(*o*) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of

the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—

(A) the judgment and commitment order;

(B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing proce-

dure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

	FY 2001		FY 2002		FY 2003		FY 2004 Pre-Blakely Only		Total Pre-Booker FY 2001 to FY 2004		Post-Booker 2/1/2005 - 3/31/2007		% Change Post-Booker
NATIONAL	**55,089**		**58,684**		**65,171**		**48,251**		**227,195**		**150,270**		
Below-Range Sentences	6,127	11.1%	6,054	10.3%	4,896	7.5%	2,498	5.2%	19,575	8.6%	18,541	12.3%	**43.2%**
Above-Range Sentences	306	0.6%	457	0.8%	541	0.8%	382	0.8%	1,686	0.7%	2,352	1.6%	**110.9%**
Out-of-Guidelines Sentences	6,433	11.7%	6,511	11.1%	5,437	8.3%	2,880	6.0%	21,261	9.4%	20,893	13.9%	**+48.6%**
D.C. Circuit	**260**		**411**		**477**		**409**		**1,557**		**1,090**		
Out-of-Guidelines Sentences	23	8.8%	26	6.3%	22	4.6%	24	5.9%	95	6.1%	179	16.4%	**+169.1%**
First Circuit	**1,480**		**1,813**		**1,832**		**1,279**		**6,404**		**3,569**		
Out-of-Guidelines Sentences	151	10.2%	168	9.3%	156	8.5%	77	6.0%	552	8.6%	663	18.6%	**+115.5%**
Second Circuit	**3,926**		**4,077**		**4,763**		**3,426**		**16,192**		**9,707**		
Out-of-Guidelines Sentences	698	17.8%	716	17.6%	786	16.5%	494	14.4%	2,694	16.6%	2,440	25.1%	**+51.1%**
Third Circuit	**2,561**		**2,656**		**2,783**		**2,086**		**10,086**		**6,593**		
Out-of-Guidelines Sentences	213	8.3%	219	8.2%	231	8.3%	123	6.1%	791	7.8%	1,204	18.3%	**+132.9%**
Fourth Circuit	**4,739**		**5,038**		**5,698**		**4,185**		**19,660**		**13,454**		
Out-of-Guidelines Sentences	269	5.7%	230	4.6%	248	4.4%	170	4.1%	917	4.7%	1,604	11.9%	**+155.6%**
Fifth Circuit	**11,203**		**12,231**		**13,298**		**9,773**		**46,505**		**33,149**		
Out-of-Guidelines Sentences	1,622	14.5%	1,475	12.1%	1,121	8.4%	436	4.5%	4,654	10.0%	3,112	9.4%	**-6.2%**
Sixth Circuit	**4,187**		**4,426**		**4,789**		**3,434**		**16,836**		**11,214**		
Out-of-Guidelines Sentences	280	6.7%	275	6.2%	277	5.8%	191	5.6%	1,023	6.1%	1,814	16.2%	**+166.2%**
Seventh Circuit	**2,392**		**2,678**		**3,041**		**2,224**		**10,335**		**6,562**		
Out-of-Guidelines Sentences	162	6.8%	201	7.5%	166	5.5%	110	4.9%	639	6.2%	1,086	16.5%	**+167.7%**
Eighth Circuit	**3,486**		**3,565**		**4,329**		**3,528**		**14,908**		**10,835**		
Out-of-Guidelines Sentences	342	9.8%	376	10.5%	356	8.2%	196	5.6%	1,270	8.5%	1,683	15.5%	**+82.3%**
Ninth Circuit	**11,893**		**11,733**		**13,286**		**9,377**		**46,289**		**27,277**		
Out-of-Guidelines Sentences	1,996	16.8%	2,101	17.9%	1,463	11.0%	668	7.1%	6,228	13.5%	3,847	14.1%	**+4.8%**
Tenth Circuit	**2,980**		**3,833**		**4,476**		**3,728**		**15,017**		**12,469**		
Out-of-Guidelines Sentences	250	8.4%	308	8.0%	271	6.1%	190	5.1%	1,019	6.8%	1,496	12.0%	**+76.8%**
Eleventh Circuit	**5,982**		**6,223**		**6,399**		**4,802**		**23,406**		**14,351**		
Out-of-Guidelines Sentences	427	7.1%	416	6.7%	340	5.3%	196	4.1%	1,379	5.9%	1,765	12.3%	**+108.7%**
Proportionality Circuits	**39,010**		**42,463**		**46,645**		**35,039**		**163,157**		**112,196**		
Out-of-Guidelines Sentences	3,716	9.5%	3,668	8.6%	3,166	6.8%	1,694	4.8%	12,244	7.5%	14,427	12.9%	**+71.3%**
Other Circuits	**16,079**		**16,221**		**18,526**		**13,212**		**64,038**		**38,074**		
Out-of-Guidelines Sentences	2,717	16.9%	2,843	17.5%	2,271	12.3%	1,186	9.0%	9,017	14.1%	6,466	17.0%	**+20.6%**

"Out-of-Guidelines Sentences" excludes government-sponsored downward departures, as defined in Appendix B of the Sentencing Commission's *Final Report on the Impact of* United States v. Booker *On Federal Sentencing* (March 2006).
"Proportionality Circuits" are the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.
"Other Circuits" are the District of Columbia, Second, and Ninth Circuits.
"% Change Post-Booker" calculates the percent change, from the Total Pre-Booker to Post-Booker periods, in the rate of Out-of-Guidelines Sentences. Although "% Change Post-Booker" accurately shows the change in rate, calculations based on the percentages shown for Total Pre-Booker and Post-Booker may yield slightly different results due to rounding.

Sources: United States Sentencing Commission, 2005 Datafiles, USSCFY05, and Preliminary Data from USSCFY06 (October 1, 2005 through September 30, 2006); United States Sentencing Commission, 2001 and 2002 Datafiles, USSCFY01 and USSCFY02; United States Sentencing Commission, *2004 Sourcebook of Federal Sentencing Statistics*, Table 26A; United States Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics*, Table 26A.

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IN THE

Supreme Court of the United States

BRIAN MICHAEL GALL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Transcript of Senate Judiciary Committee hearings on the nomination of Alberto R. Gonzales to be Attorney General, as transcribed by Federal News Service, http://sentencing.typepad.com/sentencing_law_and_policy/files/gonzales_hearing_excerpts_part_1.doc 11-12

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF)[1] is a national non-profit public interest law and policy center based in Washington, D.C., that has supporters nationwide. WLF devotes substantial resources to litigating cases and filing *amicus curiae* briefs in this and other federal courts, promoting a limited and accountable government, separation of powers, and opposing abusive civil and criminal enforcement actions by regulatory agencies and the Department of Justice.

Since the U.S. Sentencing Commission's establishment approximately 20 years ago, WLF has submitted comments to and has testified before the Commission on several occasions regarding the promulgation and application of various guidelines. WLF has also taken the Commission and its advisory committees to task and to court for failing to operate in an open and transparent manner in the formulation of Commission policy. *See Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1993); *Washington Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996).

In particular, WLF has been critical of the Guidelines and their application because they call for excessively harsh prison sentences, particularly with respect to minor regulatory infractions, when probation would be more appropriate. In addition, WLF filed a briefs in *United*

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[1] Pursuant to S. Ct. R. 37.6, *amici* hereby affirm that no counsel for either party authored any part of this brief, and that no person or entity other than *amici* and their counsel provided financial support for preparation or submission of this brief. By letters filed with the Clerk of the Court, all parties have consented to the filing of this brief.

States v. Booker, 543 U.S. 220 (2005), *United States v. Rita*, 127 S. Ct. 2456 (2007), and other Sentencing Guideline cases in the lower courts, arguing that the Guidelines are unconstitutional, flawed, generate unreasonably harsh sentences, and aggravate rather than mitigate sentencing disparity. *See, e.g., Thurston v. United States*, 358 F.3d 51 (1st Cir. 2004), *cert. pending*, No. 06-378.

WLF's Legal Studies Division also publishes relevant articles on criminal law and sentencing issues. *See, e.g.*, Brian M. Heberlig, *Avoiding Disparities Between Sentences Of Co-Defendants Is A Legitimate Sentencing Goal* (WLF Legal Opinion Letter, Apr. 7, 2006).

The Allied Educational Foundation (AEF) is a non-profit public policy organization based in Englewood, New Jersey. Founded in 1964, AEF promotes diverse areas of study in public policy issues and has appeared as *amicus curiae*, along with WLF, in numerous cases, including *Booker, Rita,* and *Thurston*.

SUMMARY OF ARGUMENT

The overarching goal of sentencing is to select and impose a just punishment that achieves the principles of deterrence, retribution, and rehabilitation. Congress mandated that sentencing judges, when considering what punishment to impose in a particular case, carefully consider the nature and circumstances of the offense *and* the characteristics of each individual offender, in addition to the other sentencing factors specified in 18 U.S.C. § 3553(a), including the "kind of sentences available." 18 U.S.C. § 3553(a)(3).

Congress also mandated that the sentence ultimately imposed must be one that "is sufficient, but not greater than necessary" to achieve the purposes of punishment. 18 U.S.C. § 3553(a). This so-called parsimony principle forbids a civilized society from inflicting gratuitous punishments on its citizens.

The Sentencing Reform Act of 1984 (SRA) altered sentencing policy in two major ways. *First*, it abolished the parole system and established a determinate sentencing scheme. No longer would the typical prisoner convicted of a non-violent crime be eligible for and usually receive parole after serving one-third of the sentence imposed by the court.

As will be further discussed, *infra*, an appreciation of this fundamental change in sentencing practice from a parole system to a determinate sentencing scheme is crucial for a proper understanding of the unreasonableness of many Guideline sentences, and why an extraordinary circumstances test for reviewing the reasonableness of a below-Guideline sentence should be rejected. As a general proposition, any Guideline sentence should be multiplied by three in order to fairly calculate what a comparable pre-Guideline sentence would have been. For example, in this case, Petitioner Gall's Guideline sentence of 30-37 months translates into a harsh pre-Guideline sentence of 90-111 months, or 7 1/2 to over 9 *years* for this non-violent first offender. *Amici* submit that such a lengthy sentence would not likely have been considered, let alone imposed, in the pre-Guideline era. In short, there is no good reason to require a showing of extraordinary circumstances for imposing a non-Guideline sentence, and many reasons not to. This is true particularly when reviewing the reasonableness of a sentence of probation and other non-

prison alternative sentences, for which the Guidelines unfortunately and impermissibly exhibit a strong aversion.

Second, the SRA created the Sentencing Commission, an agency which devised a set of fairly rigid Guidelines that sentencing courts were required to follow in determining a sentence. 18 U.S.C. § 3553(b). Sentences imposed under the Guidelines often resulted in excessive punishments that fit neither the crime nor the offender, thereby doing great violence to the parsimony principle.

Prior to this Court's decision in *Booker*, sentencing courts were sometimes forced against their better judgment to "stack" or stretch the sentences for multiple charges against a defendant by making the sentences run consecutively instead of concurrently (as they otherwise would have done in the pre-Guideline era) in order to meet the harsh Guideline sentence. In other cases, the sentences called for in the Guidelines were so severe that they exceeded the statutory maximum sentence permitted for the offense. In those cases, the court was required to lop off the end of the Guideline sentence to make it fit within the statute's maximum term of imprisonment. This Procrustean approach to sentencing fundamentally subverted the principle of making the punishment fit the crime and the offender; instead, the Guidelines effectively forced the crime and offender to fit the punishment.

Further, the unduly harsh sentences, often called for by the Guidelines in this and other cases, give short shrift to the § 3553(a) factors and the parsimony principle. Requiring a district court to show extraordinary circumstances on a sliding or proportional scale the further the sentence imposed by the court varies from a Guideline sentence impermissibly elevates the Guidelines to a

preferred status that they do not deserve and is not allowed under *Booker* and *Rita*. This is particularly true if the proportionality test were applied by appellate courts when reviewing probationary and other non-prison alternative sentences, such as home confinement, community service, fines, restitution, or a combination thereof. In all of those cases, the sentence imposed would constitute, as the court of appeals below found in this case, a 100 percent departure from any Guideline sentence calling for any length of prison term, and thus be prone for reversal.

Thus, the extraordinary circumstances test would lead, as it did here, to impermissible reversals of probationary and other non-Guideline sentences. That result would be tantamount to a *de novo* appellate review of the sentence as opposed to a deferential abuse of discretion standard that this Court required in *Booker* and *Rita*.

ARGUMENT

I. BECAUSE THE SENTENCING GUIDELINES REGULARLY CALL FOR UNREASONABLE SENTENCES THAT VIOLATE THE PURPOSES OF SENTENCING, A SHOWING OF EXTRAORDINARY CIRCUMSTANCES SHOULD NOT BE REQUIRED TO JUSTIFY A NON-GUIDELINE SENTENCE.

Congress mandated in 18 U.S.C. § 3553(a) that the sentencing court "*shall* impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes [of punishment] set forth in paragraph (2) of this subsection," *viz.*, "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide a just punishment for the offense; (B) to afford adequate [general]

deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant [specific deterrence]; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2) (emphasis added). The directive that the sentence be "sufficient, but not greater than necessary" to comply with these sentencing purposes is the parsimony principle, an important hallmark of a civilized society that does not inflict arbitrary, wanton, or gratuitous punishment on its citizens.

Congress also commanded that in determining the appropriate sentence, the judge must consider six other sentencing factors, including the appropriate Sentencing Guideline, 18 U.S.C. § 3553(a)(4), and any pertinent policy statement issued by the Sentencing Commission, § 3553(a)(5).[2] While *all* the factors listed must be considered by the Court, no special weight is required to be given to the Guidelines or any Commission policy statement. The end result must be a sentence chosen thoughtfully, as it was here, that is sufficient, but not greater than necessary, to serve the purposes of sentencing specified in § 3553(a)(2), and supported by a statement of reasons.

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[2] The other four factors specified in 18 U.S.C. § 3553(a) that must be considered by the sentencing court are:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant; * * *
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> (3) the kinds of sentences available; * * *
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

One of the rationales for the SRA was the perception that judges' broad sentencing discretion resulted in a fragmented sentencing system that produced unwarranted disparity in sentences and a lack of fairness. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 37-190 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3220-3373.[3]

When the SRA abolished parole and established a determinate sentencing scheme, the sentence imposed was essentially the sentence served. Wholly independent of the truth-in-sentencing reform, left untouched by *Booker*, Congress also established the Sentencing Commission to promulgate Sentencing Guidelines to achieve a measure of uniformity by effectively dictating the sentence within a narrow range to be imposed on a defendant convicted of a federal offense. 18 U.S.C. § 3553(b). In so doing, application of the Sentencing Guidelines under § 3553(b) in a particular case would trump any sentencing decision reached solely after considering the seven factors in § 3553(a), even if the resultant Guideline sentences were unduly harsh (as they often were), and in clear violation of the parsimony principle.

All of that changed when this Court ruled in *United States v. Booker*, 543 U.S. 220 (2005), that the Sentencing Guidelines violated a defendant's Sixth Amendment rights,

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[3] In fact, sentencing disparities that existed in the federal system before the passage of the Guidelines were apparently minor or statistically insignificant and not based on impermissible factors such as race and ethnicity. *See* Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 105-42 (1998). "It bears emphasizing . . . that an examination of . . . early studies and other data from the pre-Guidelines period belies the notion that sentencing in the federal courts was 'shameful,' 'lawless,' or 'arbitrary.'" *Id.* at 111.

and as a remedy, excised 18 U.S.C. § 3553(b). In so doing, the Court deleted the mandatory feature of the Guidelines, thereby making them "effectively advisory." *Id.* at 245. Henceforth, the Guidelines are to be simply one of seven factors a sentencing court must consider in fashioning a just sentence. However, many trial courts and courts of appeals continued to apply the Guidelines as if they were mandatory, affording them a presumption of reasonableness.

In *Rita v. United States*, 127 S.Ct. 2456 (2007), this Court addressed this issue and concluded a Guideline sentence *may* be regarded by a reviewing court to be a presumptively reasonable sentence because the sentence was the result of the decision by the sentencing court that comported with a Guideline sentence promulgated by the Sentencing Commission allegedly based on empirical evidence. *Id.* at 2463.

While *amici* disagree with the *Rita* decision, this Court nevertheless made it clear that the presumption of reasonableness was not mandatory for a reviewing court. More importantly, the Court reiterated that "appellate 'reasonableness' review merely asks whether the trial court *abused its discretion*." *Id.* at 2465. Moreover, the presumption does not apply to the sentencing court which need only consider the Guideline sentence as one of several factors: "A nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence." *Id.* (emphasis in original). *Rita* posited several scenarios why a sentencing court could justifiably impose a non-Guideline sentence, including the assessment that "the Guidelines sentence itself fails properly to reflect 3553(a) consideration, or perhaps because the case warrants a different sentence regardless [of

the Guidelines]." *Id.*

To use administrative law parlance, the Guidelines are not to be given any *Chevron* deference; at best, they warrant only *Skidmore*-type deference.[4] In short, the Guidelines are to be considered by the sentencing court only for what they are worth in that particular case for that particular offender, and as only one of several sentencing factors, without enjoying any presumption of reasonableness.

Consequently, while district courts must certainly provide reasons for their sentence to aid appellate review, their decision is to be afforded great deference because of their familiarity with the defendant and the facts in the case. Sentencing judges should not be required to show extraordinary circumstances in a proportional manner as the sentence imposed deviates from the Guideline sentence. This is particularly true when, as will be discussed further, Guideline sentences inordinately call for harsh prison sentences, and thus, any probation or non-prison sentence, regardless of their length or strict conditions, would mathematically speaking be a 100 percent departure from a Sentencing Guideline as the court of appeals below indicated. Under the proportional review standard adopted by the court below and other courts of appeals, such

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[4] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (agency ruling, "while not controlling upon the courts by reasons of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

otherwise reasonable non-prison sentences would be subject to reversal.

A. The Guidelines Are Unreasonable Because They Call For Excessively Harsh Sentences Compared to Sentences Imposed in the Pre-Guideline Era.

The reason the Guidelines often generate excessive sentences is primarily due to design defects in their promulgation. All of the sentencing factors of § 3553(a) were not fully taken into account, particularly those regarding offender characteristics, nor could they be. Under the Guidelines before *Booker*, judges could not fully consider a defendant's personal situation, family responsibilities, education, health status, military service, charitable and community service activities, and the like, as they did prior to the promulgation of the Guidelines.[5] The "one-size-fits-all" approach of the Guidelines, which were purportedly designed to reduce unwarranted sentencing disparity, often spawned more of it.

More significantly, the Guidelines are fundamentally flawed because they regularly dictate prison terms that are several *times* longer than terms actually served in the pre-Guideline era for the same offense. Because the SRA abolished parole, offenders will no longer be released after serving only one-third of their time. More importantly, the Guidelines directly violate Congress's directive in 28 U.S.C. § 994(j) -- that probation be the norm for non-violent first offenders -- by greatly reducing the availability

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[5] *Rita* acknowledged this argument, but expressly declined to address it because it was not raised in the court of appeals. *Id.* at 2470.

of probation and other non-prison punishments for numerous offenses. The Commission never adequately explained this radical departure from the pre-Guideline sentencing practice. The SRA was not a "get-tough-on-crime" statute; rather, its goal was to provide truth-in-sentencing with a determinate sentencing scheme, and to achieve a measure of uniformity, but not to impose uniformly harsh and excessive sentences across-the-board.

The fundamental defect with the Guidelines is that they were drafted without the Commission hewing to Congressional commands. Congress intended that "for the most part the average time served [under the Guidelines] should be similar to that served today in like cases." S. Rep. No. 225, *supra*, at 116. *See also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 17 (1988) (Guidelines were primarily to be based on "typical, or average, actual past practice"). In addition, Congress directed the Commission to develop the Guidelines to "reflect the general appropriateness of imposing a sentence *other than imprisonment* in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j).[6] But thanks to the flawed Guidelines, our nation's

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[6] The history of this provision suggests that prison was to be used for the principal purpose of incapacitation (specific deterrence) or retribution when the defendant would be a danger to the community if left free to remain at large. 130 Cong. Rec. S542-43 (daily ed. Jan. 31, 1984) (remarks of Senator Nunn). Attorney General Alberto Gonzales apparently shares this view, having opined during his confirmation hearings two years ago that incarceration is best suited "for people who commit violent crimes and are career criminals." Transcript of Senate Judiciary Committee hearings on the nomination of Alberto R. Gonzales to be Attorney General *accessed at*

prisons are packed with inmates serving sentences that far exceed the typical or average sentence imposed and served in the pre-Guideline era, including sentences by first offenders who have been convicted of non-violent and minor offenses.

The source material allegedly utilized by the Commission in determining past sentencing practices include a 1,279 page report summarizing some 40,000 sentences imposed from January 1, 1984 to February 28, 1985. *Punishments Imposed on Federal Offenders* (Federal Judicial Center 1986). In reviewing the sentences imposed for various categories of offenses, one is struck by how frequently probation was imposed in the pre-Guideline era. This practice properly reflected the goals of parsimony in meeting the purposes of punishment, as well as considering the "kind of sentences available" as required by § 3553(a)(3).[7] Furthermore, the relevant pre-Guideline sentencing data is not the prison term imposed, but rather

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http://sentencing.typepad.com/sentencing_law_and_policy/files/gonzales_hearing_excerpts_part_1.doc. Petitioner Gall did not commit a violent crime and is not a career criminal or a danger to the community.

[7] For example, convictions for the non-violent crime of mail or wire fraud resulted in probation sentences in 57.5 percent of the cases. *Id.* at 3-250, Table 3-58. Many of these probation sentences included fines, community service, and restitution. For those convicted for making a false statement within the jurisdiction of a federal agency who had no prior convictions, 76 percent were given probation. *Id.* at 3-222, Table 3-75. For drug offenses on the relatively small scale as that committed by Gall, converting the quantity of the MDMA drug in question to less than 200 pounds of marijuana under the Guideline's formula, almost 33 percent of first offenders received probation. *Id.* at 4-160, Table 4-38. Only *one* defendant served above the minimum 30 months called for by the Guidelines in this case. *Id.*

the actual amount of time served, due to the fact that parole was routinely given after an inmate served one-third or less of his time; on the other hand, a probation sentence under the Guidelines is rarely an available punishment, even for first offenders.[8] This occurs because the Commission structured the Guidelines in such a way that Base Offense Level scores can be easily increased by adding Specific Offense Characteristics that take probation off the table as a sentencing option.[9]

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[8] The Court in *Rita* may have misspoke when it stated that "the Commission took an 'empirical approach,' beginning with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past. . . ." *Rita* at 2464. The presentence reports, prepared by the probation office, only give background on the offender and the offense and provide guidance to the sentencing court as to what sentences *should be* imposed in a particular case. As for what the judges "had done in the past," the sentences imposed by the judges are not the relevant metric to be used in fashioning the Guidelines (except for sentences of probation); rather, the relevant metric is the length of the sentence actually served. To be sure, the Commission had such sentencing data before it. The real question is what did the Commission do with the data in devising the Guidelines, and how good of a job did it do in meeting the Congressional directives and sentencing factors in 18 U.S.C. § 3553(a).

[9] According to a survey conducted by the Federal Judicial Center, nearly two-thirds of the judges contacted (65.8 percent) indicated that the Guidelines do *not* appropriately identify offenders who should be eligible for alternatives to incarceration; 60.2 percent of Chief Probation Officers similarly agree. *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey* at 101 (1997). In addition, 84.7 percent of the judges surveyed agreed that Congress should expand the so-called "safety valve" provision (18 U.S.C. § 3553(f) and USSG §5C1.2) so that *more* defendants would be eligible for sentence reductions under its provisions. *Id.* at 69. These views by experienced sentencing experts are further evidence of the structural design flaws of the Guidelines and their failure to reflect the feedback

More significantly, under the pre-Guideline parole system, the normal practice was that defendants sentenced to prison for more than one year were generally eligible for parole after serving only one-third of the sentence imposed, with these inmates receiving their initial parole hearing within 120 days after incarceration. 18 U.S.C. § 4205(a) (repealed 1984). Indeed, for those inmates who were considered "very good" candidates for parole, and whose criminal offense level was a Category Three or less,[10] the customary total time to be served in prison before being paroled would be 10 months or less. *See* Paroling Policy Guidelines for Decisionmaking, 28 C.F.R. 2.20 (Parole Guideline chart attached hereto as App. 1a). In short, even if Gall had been sentenced to prison instead of probation in the pre-Guideline era, he likely would have been released after serving a minimal time of a few months. But as previously noted, the Gall's Guideline sentence of 30-37 months translates into an excessive pre-Guideline sentence of some 7-9 *years*.

Unduly harsh sentences are common under the flawed Guideline system and have been unfairly imposed over the years even on those who committed even minor regulatory offenses. This is a particular problem in the environmental area. Consider the case of *United States v.*

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from the judiciary about the need to revise them. For an excellent discussion of this issue, *see* Brief Amici Curiae of the Federal Public and Community Defenders, *et al.*

[10] For those crimes not listed in specific categories in the parole guidelines, the general rule is that for crimes where the maximum sentence is less than 2 years, the offense level is Category One; for statutes providing sentences from 2 to 3 years, the level is Category Two; and for sentences of 4 to 5 years, the level is Category Three. 28 C.F.R. 2.20, Chapter 12 Miscellaneous Offenses.

McNab, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004), where the sentencing court was forced to mete out draconian 97-month prison sentences to first offenders for the "crime" of violating the Lacey Act by importing frozen seafood from Honduras in clear plastic bags instead of cardboard boxes. This shipping practice was alleged by the government to have violated an obscure Honduran regulation that even the Honduran government argued was invalid and could not be enforced in its own country. The length of the sentence was artificially dictated by the market value of the large quantity of seafood shipped in this innocuous manner, even though the defendants' profits as seafood importers and brokers were a small fraction of the seafood's aggregate value.

Applying the general rule of thumb to multiply a Guideline sentence by three to gauge its pre-Guideline severity, the 97-month sentences for the first offenders in *McNab* translate into surreal sentences of 297 months, or almost 25 years.[11] In order to stretch the crime to make it fit the 97-month punishment (which was at the low end of the Guideline range), the sentencing court had to carve out a 37-month portion from a 60-month maximum sentence from one of the charges, and stack it on top of a maximum 60-month sentence from another charge, making the two sentences run consecutively (with the other counts running concurrently). *See* Blandford Pet. at 7; Pet. App. at 173a, No. 03-627, *cert. denied*, 540 U.S. 1177 (2004).

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[11] *See* Tony Mauro, *Lawyers Seeing Red Over Lobster Case*, Legal Times (Feb. 16, 2004). In addition, such extreme sentences of 25 years and even more have in fact been recently imposed on major white collar offenders. *See* Amicus Curiae Brief for the New York Counsel of Defense Lawyers at 27-28.

These kinds of harsh sentences clearly violate the parsimony principle and every other sentencing factor in 18 U.S.C. § 3553(a), including the need "to promote respect for the law" as provided in § 3553(a)(2)(A). Neither the defendant nor society can have any "respect for the law" when the Guidelines mechanistically produce unduly harsh punishments. Indeed, the opposite is true: rigid Guideline sentences have been met with scorn and contempt by judges and the public alike.[12]

To be sure, Congress authorized the Sentencing Commission in 28 U.S.C. § 994(m) to depart from past sentencing practice if sentences were too lenient for serious crimes, but Commission Policy is that "when departures [from pre-Guideline sentencing practice] are substantial, the *reasons for departure will be specified.*" Paragraph 6, Principles Governing the Redrafting of the Preliminary Guidelines, adopted December 16, 1986, *reprinted in* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 50 (1988) (emphasis added). However, the record is sparse if not blank as to what the Commission's articulated reasons were for departing from past sentencing practice on an offense by offense basis. This is particularly

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[12] Federal judges have repeatedly complained that the Guidelines' "wholly mechanical sentence computation" reduces the judiciary to "automaton[s]," "rubber-stamp bureaucrat[s]," or "accountant[s]." Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, Cato Policy Analysis, Nov. 1, 2002 at 28 n.87 (collecting cases and other sources); *see also United States v. Green*, 346 F. Supp. 2d 259, 281 (D. Mass. 2004) ("To call our present federal sentencing structure a 'guidelines' system suggests that the district judge still plays a central role. She does not. Other than determining the controlling sentencing factors . . . , the district judge's role is purely mechanistic, applying arithmetically the sentencing factors . . . .").

true for sentences meted out for certain regulatory infractions when the pre-Guideline practice was typically probation, remediation, community service, and fines.[13] It appears that the Commission did not do all of its homework, as required by Congress, before sharply departing from past sentencing practice.

When a statute clearly commands an agency to undertake certain studies before promulgating regulations, and the agency's own policy requires it to articulate reasons for departing from the data in establishing the regulation, the courts are required to set aside the regulations when the agency has done neither. For example, in *Envtl Def. Fund, Inc. v. EPA*, 898 F.2d 183 (D.C. Cir. 1990), the court was called upon to determine whether the EPA had properly followed Congressional directives in setting certain emission levels [compare to Guideline levels] and determining whether they were stringent enough [compare to the parsimony principle]. When it found the record was barren, the court struck down the rule, stating, "[w]e cannot sustain [agency] action merely on the basis of interpretive theories that the agency *might have adopted* and findings that (perhaps) it *might have made*." *Id.* at 189 (emphasis added). *See also Chamber of Commerce v. Securities and Exchange Comm'n*, 412 F.3d 133 (D.C. Cir. 2005) (agency rule invalidated for not taking costs into account as required

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[13] In the few cases where incarceration was imposed in the pre-Guideline era for environmental offenses, the length of the prison sentences *imposed* (not the length actually served) were usually for a few weeks or months, coupled with fines and remediation, all of which adequately served the principles of punishment and deterrence. *See generally* U.S. EPA, Office of Enforcement, National Enforcement Investigations Center, Denver *Summary of Criminal Prosecutions Resulting From Environmental Investigations* (May 31, 1991).

by statute or considering alternatives). As this Court has stressed, reviewing courts must be sure that an agency has "examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983).

Here, the Guidelines, just like other agency rules, are vulnerable from both a procedural and substantive challenge. *See* Ronald F. Wright, *Sentences, Bureaucrats, and the Administrative Law, Perspective on the Federal Sentencing Commission*, 79 Calif. L. Rev. 3 (1991); *id.* at 89 ("sentencing courts should remain receptive to offenders' objections to the procedures employed by the Commission in promulgating guidelines"). In *United States v. Lee*, 887 F.2d 888 (8th Cir. 1989), for example, the court unanimously struck down the applicable guideline in that case, USSG §2J1.6, and remanded the case to the district court for resentencing as if the Guideline did not exist. The court did so because the Guideline in question was "not sufficiently reasonable and violate[d] the statutory mandate given to the Sentencing Commission" by producing unreasonably lengthy sentences. *Id.* at 892. Comparing the U.S. Sentencing Commission to any other regulatory agency, the court concluded that the standard of review for agency regulations (guidelines) is whether they are "sufficiently reasonable" in light of the congressional directive given to the Sentencing Commission. *Id.* at 890 (citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981)). But as previously discussed, no *Chevron* deference is due to the Commission's Guidelines, and as *Rita* made clear, a Guideline sentence does not enjoy a presumption of reasonableness by the sentencing court.

B. The Guidelines Are Flawed Because They Mandate Statutory Maximum Punishments For First Offenders In Violation of the Parsimony Principle.

Another major defect in the Guidelines is that in a number of cases they require the sentencing judge to impose the statutory maximum sentence, despite all the other § 3553(a) factors counselling otherwise. This result clearly violates the parsimony provision because the Guidelines call for a prison sentence greater than what Congress declared should be the statutory maximum for the worst offender. Indeed, the Commission even contemplated that this bizarre result would occur by promulgating a specific application Guideline that would lop off any excess of the Guideline sentence that is greater than the statutory maximum. USSG §5G1.1(a).[14]

An excellent case study of this troubling phenomenon, which covers both pre- and post-*Booker* analysis, is *United States v. Thurston*, 358 F.3d 51 (1st Cir. 2004), *cert. pending*, No. 06-378. Mr. Thurston was charged with one count of conspiracy under 18 U.S.C. § 371 with respect to his company's medicare billing practice for laboratory blood testing. His co-defendant, who the district court found was the prime architect of the challenged practice, was offered a plea bargain that he accepted. He was allowed to plead nolo contendere, did not furnish any assistance to the government, and received three years of probation.

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[14] "Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence." USSG §5G1.1(a).

The government offered a similar plea deal to Thurston. Thurston rejected the offer because he believed he was innocent and exercised his constitutional right to stand trial. Two defense expert witnesses testified at trial that the challenged blood testing practice was a lawful industry practice. *Id.* at 60. There was no allegation or finding that Mr. Thurston financially benefited personally from the company's billing practice. Nevertheless, a jury found him guilty of one count of conspiracy, which carries a maximum sentence of five years or 60 months. 18 U.S.C. § 371.

Although the government readily accepted a probationary sentence as suitable punishment for the more culpable co-defendant, and thus tacitly acknowledged that it served the principles of punishment as provided by § 3553(a), the Guideline sentence for Thurston was computed as 78 to 97 months. But because the statutory maximum punishment was 60 months, the excess had to be trimmed in fine Procrustean fashion to fit the statutory maximum. The district court departed from the Guidelines and imposed a reasonable split six-month term -- three-months to be served in prison and three months to be served by home detention -- followed by 21 more months of supervised release. The court imposed this sentence in order to avoid a gross disparity with the probation sentence given to the more culpable co-defendant, and because of Thurston's civic and charitable works. This reasonable sentence "outraged the prosecutors" and the government appealed. 358 F.3d at 55.

The First Circuit reversed, finding that the then mandatory Guidelines "bind us and they bind the district court," and therefore, downward departures for unwarranted disparities "in sentences among co-defendants was

impermissible." *Id.* at 78. Mr. Thurston would have to return to prison and serve the maximum five years (which is effectively a pre-Guideline sentence of 15 *years*). Thurston sought review in this Court, which summarily vacated the judgment and remanded following its *Booker* decision. *Booker*, 543 U.S. 1097 (2005).

On remand, a different sentencing judge[15] held a searching two-day hearing. At the conclusion, the court decided to impose the original 6-month split sentence, carefully explaining his reasons. Significantly, the court concluded that the sentence it imposed on Thurston was "sufficient and no more than necessary to serve the statutory purposes" of § 3553(a). *See* Thurston Pet. App. at 188a, No. 06-378. This sentence apparently outraged the prosecutors yet again and the government appealed Thurston's sentence for a second time.

The First Circuit reviewed Thurston's sentence this time for reasonableness under the post-*Booker* voluntary guidelines and reversed Thurston's sentence again. The court of appeals held that the sentence was unreasonable, in part, because, in the court's view, the Guidelines -- which called for a sentence that was much longer than the statutory maximum for a first offender --- are an "important consideration" for a sentencing court because they have the "imprimatur" of an alleged "expert agency." *United States v. Thurston*, 456 F.3d 211, 215 (1st Cir. 2006). It further held that any sentence imposed on remand that falls below

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[15] The original judge recused himself from the case on remand, apparently due to his disgust for the harsh and inflexible Guidelines. Other judges have done the same in other cases remanded for resentencing. *See, e.g., United States v. Likens*, 2007 U.S. Dist. LEXIS 38925 (D. Iowa 2007).

a three-year prison term (an effective pre-Guideline sentence of *9 years*) would be unreasonably lenient and would presumably be reversed for third time. *Id.* at 220. Astonishingly, the court of appeals further opined that if it were the sentencing authority, it would impose a sentence "at or near" the statutory maximum term of five years.[16] *Id.*

Congress provided that the *maximum* prison sentence for Thurston's crime should be five years in prison. Yet the Guidelines dictated a 78 to 97 month sentence for Thurston, a first-offender. Applying an uncapped Guideline sentence in the case would result in a sentence that would be approximately 30 to 60 percent *longer* than what Congress intended should be meted out to the *worst* offender for the *worst* possible case for the underlying object of the conspiracy. In short, even if the sentence is capped, the statutory *maximum* sentence that *could* be imposed became the mandatory *minimum* sentence that were called for by the Guidelines. *Amici* urge that the instant case be decided in a way that would put an end to this kind of *de novo* second-guessing by the appellate courts.

Other absurd examples of white collar cases where the minimum Guideline sentence far exceeds the statutory maximum are discussed in the Amicus Brief of the New

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[16] Not only do the Guidelines dictate a patently harsh and unreasonable sentence, they run directly counter to Congress's directions to the Commission that "a term of imprisonment at or near the maximum term authorized for categories of defendants" be reserved for the class of thrice-convicted felons who have been convicted of crimes of violence and/or certain drug offenses. 28 U.S.C. § 994(h). Mr. Thurston, a pillar in this community, is a first-offender who was not convicted of a crime of violence or drug offense.

York Council of Defense Lawyers. *See* NYCDL Br. at 28-29 (citing, *inter alia, United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006), where Judge Rakoff observed that the guideline calculations have "so run amok that [they] are patently absurd on their face.")

C. The Extraordinary Circumstances Test Would Discourage Probation And Non-Prison Sentences And Violate The Congressional Directive That Guideline Sentences Should Reduce The Likelihood Of Prison Overcrowding.

As discussed earlier, the Guidelines do not faithfully adhere to Congress's command that probation should be the norm for non-violent first offenders for many offenses. The Guidelines are also flawed because they violate the Congressional directive that they "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . . ." 28 U.S.C. § 994(g). In fact, the Guidelines appear to have been formulated to *maximize* the likelihood that the prison population would exceed the capacity of federal prisons. Because the flawed Guidelines routinely generate unduly harsh prison sentences, it should come as no surprise that the federal prison population has far exceeded its capacity by over *40 percent*. U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2004* at 7.

One of the § 3553(a) sentencing factors that courts are required to consider is the "kind of sentences available" 18 U.S.C. § 3553(a)(3). In addition to incarceration, for which the Guidelines are heavily skewed, there are a variety of sentencing options available to a sentencing judge, such as probation (supervised or unsupervised); home

confinement (including electronic monitoring, visitor restrictions, and other conditions deemed appropriate);[17] halfway houses; community service; restitution; forfeiture; and monetary fines; or a sentencing package involving a mixture of all these sanctions.

To be sure, while the substantial three-year probationary sentence in this case is a reasonable one, there could have been other non-prison sentences that would also fall within the range of reasonableness; but, under the extraordinary circumstances test adopted by the court below, they all would be subject to reversal as well. For example, the sentencing court could have imposed a non-prison sentence consisting of a period of home confinement, community service appropriate to the offense (e.g., working in a drug rehabilitation facility for teens), and/or a fine in an amount that reflected the defendant's ill-gotten profits. Because such a sentence is a 100% deviation from the 30-37 month Guideline sentence, the extraordinary circumstances test would allow courts of appeals to second-guess the judge's discretion on a *de novo* standard. *See* NYCDL Brief at 14-15 (citing numerous cases where non-prison sentences, including home detention, probation, fines, and the like, were reversed by appellate courts).

Regrettably, many of these sentencing options are not provided for under the Guidelines, even though a non-prison sentence comports with the parsimony provision in many cases. Violations of any of the numerous conditions of probation (*e.g.*, drug testing, employment, restitution,

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[17] For a good description of the costs and benefits of home confinement, see Paul J. Hofer and Barbara S. Meierhoefer, *Home Confinement: An Evolving Sanction in the Federal Criminal Justice System*, Federal Judicial Center (1987).

community service, and the like) will trigger probation revocation proceedings, and if warranted, incarceration will follow. Unfortunately, errors for imposing excessive prison terms in violation of the parsimony provision cannot be corrected because parole has been abolished.

CONCLUSION

For the foregoing reasons and those of petitioner and his other amici, the judgment of the court of appeal should be reversed.

Respectfully submitted,

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APPENDIX

GUIDELINES FOR DECISIONMAKING

[Guidelines for decisionmaking, customary total time to be served before release (including jail time)]

Offense Characteristics: Severity of offense behavior	Offender characteristics: Parole prognosis (salient factor score 1998) Very good (10 to 8)	Good (7 to 6)	Fair (5 to 4)	Poor (3 to 0)
	Guideline range (months)			
Category:				
1	[</=]=4	[</=]=8	8-12	12-16
2	[</=]=6	[</=]=10	12-16	16-22
3	[</=]=10	12-16	18-24	24-32
4	12-18	20-26	26-34	34-44
5	24-36	36-48	48-60	60-72
6	40-52	52-64	64-78	78-100
7	52-80	64-92	78-110	100-148
8	100+	120+	150+	180+

Source: 28 C.F.R. 2.20 Paroling policy guidelines (footnote omitted)